TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 241.

CLARK W. HERON, ASSIGNEE IN BANKRUPTCY OF THE [illegible] WESTERN INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL McLAUGHLIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

[illegible] 1879.

SUPREME COURT OF THE UNITED STATES.

No. 261.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY, OF THE GREAT WESTERN INSURANCE COMPANY, PLAINTIFF IN ERROR.

vs.

DANIEL McLAUGHLIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

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Upton, assignee in bankruptcy of the Great Western Insurance Company, was plaintiff and Daniel McLaughlin was defendant, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked "A," and made a part of this petition; and the said plaintiff in error avers that there is error in the said record and proceedings in this, to wit:

1. Because the court erred in sustaining the demurrer to the fourth ground of defense in the defendant's answer; that is to the set-off therein pleaded.

2. Because the court erred on the trial of said cause in overruling the defendant's objection to the introduction *to the introduction* of the laws of the State of Illinois in evidence to the jury so far as the same
5 were offered to be read to the jury in evidence.

3. Because the court erred on the trial of this cause in admitting in evidence over the defendant's objection a certified copy of the proceedings incorporating and reincorporating the Great Western Insurance Company, and authorizing its capital stock to be increased to five million dollars.

4. Because the court erred on the trial of the case in admitting in evidence over the defendant's objection the certified copy of annual statement of the Great Western Insurance Company to the auditor of the State of Illinois.

5. Because the court erred on the trial of this cause in permitting to be given in evidence to the jury, over the defendant's objection, the document numbered 3½.

6. Because the court erred on the trial of this case in permitting to be given in evidence to the jury, over the defendant's objection,
6 the certified copy of the petition in bankruptcy against the Great Western Insurance Company, and the rule to show cause.

7. Because the court erred on the trial of this cause in admitting in evidence, over the objection of the defendant, the copy of the order of adjudication in bankruptcy.

8. Because the court erred on the trial of this cause in admitting in evidence to the jury, over the defendant's objection, copies of the appointment and of the acceptance of the assignee in bankruptcy.

9. Because the court erred on the trial of this cause in admitting in evidence, over the defendant's objection, the deed of assignment to the plaintiff.

10. Because the court erred on the trial of the cause in admitting in evidence, over the defendant's objection, the copy of the notice alleged to have been published in the Chicago daily Inter-Ocean.

7 11. Because the court erred on the trial of this cause in admitting the copy of the pretended call upon stockholders in evidence over defendant's objection.

12. Because the court erred on the trial of this cause in admitting in evidence, over the defendant's objection, the certificate of stock.

13. Because the court erred on the trial of this cause in admitting in evidence, over the defendant's objection, the pretended list of stockholders at Cheyenne as appeared on page 84 of the pretended stock ledger of the Great Western Insurance Company, prepared after the great fire in Chicago.

14. Because the court erred on the trial of this cause in refusing to allow the defendant, when on the stand as a witness, to answer the following question:

"State all the facts and circumstances connected with the signing of this bond by you, No. 1880, and its delivery to the Great Western In-

surance Company; what statements and representations were
8 made to you by said company, if any, relating to the subject matter of said bond."

15. Because the court erred in rejecting the written offers of the defendant to testify concerning the facts and circumstances under which the defendant signed the bond and took the certificate of stock.

16. Because the court erred on the trial of this cause in refusing to allow the defendant, when being examined as a witness, to answer the following question:

"State what, if anything, occurred between you and the Great Western Insurance Company, after the return to you of your bond and prior to the bankruptcy of the company, relative to its attempt to levy an assessment upon your ten shares of stock."

17. Because the court erred in rejecting the written offer of the defendant to testify concerning what took place between defendant
9 and the Great Western Insurance Company, prior to its bankruptcy, relative to its attempt to levy an assessment upon the ten shares of stock of the defendant.

18. Because the court erred in giving to the jury the second instruction asked by the plaintiff.

19. Because the court erred in giving to the jury the third instruction asked by the plaintiff.

20. Because the court erred in giving to the jury the fourt' instruction asked by the plaintiff.

21. Because the court erred in giving to the jury the sixth instruction asked by the plaintiff.

22. Because the court erred in giving to the jury the seventh instruction asked by the plaintiff.

23. Because the court erred in refusing to give to the jury the sixth instruction asked by the defendant.

10 24. Because the court erred in refusing to give to the jury the seventh instruction asked by the defendant.

25. Because the court erred in refusing to give to the jury the eighth instruction asked by the defendant.

26. Because the court erred in refusing to give to the jury the ninth instruction asked by the defendant.

27. Because the court erred in its written instructions to the jury, as the statements therein are incorrect and ambiguous and well calculated to mislead the jury.

28. Because the court erred in refusing to allow the written request for special findings to be made to the jury.

29. Because the verdict is not sustained by sufficient evidence.

30. Because the verdict is contrary to law.

11 31. Because the court erred in refusing to set aside the verdict and order a new trial.

32. Because the court erred in rendering judgment in favor of the plaintiff, and against the defendant.

The said Daniel McLaughlin, therefore, prays that the said judgment may be reversed, and the said plaintiff in error restored to all things he has lost by reason thereof.

W. W. CORLETT AND
THOS. J. STREET,
Attorneys for Plaintiff in Error.

(Endorsed on the back as follows, to wit:) Petition in error. Filed in open court, by leave of court, this 18th day of April, A. D. 1877. J. W. Bruner, clerk supreme court.

TERRITORY OF WYOMING,
County of Laramie:

In district court first judicial district.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
vs.
DANIEL MCLAUGHLIN, DEFENDANT.

Bill of exceptions.

Be it remembered that heretofore, to wit, on the 8th day of April, 1876, the above-named plaintiff filed in the office of the clerk of said district court a petition in the words and figures following, to wit:

Petition.

In the district court of the 1st judicial district of Wyoming Territory, in and for Laramie County.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
13 *vs.*
DANIEL MCLAUGHLIN, DEFENDANT.

Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, plaintiff above named, complains of Daniel McLaughlin, defendant, for that the Great Western Insurance Company is a body corporate, heretofore created and existing under the laws of the State of Illinois, having its principal office and place of business at the city of Chicago, in said State, was duly constituted a body corporate by virtue of an act of the legislature of the State of Illinois, entitled an "Act to incorporate the Great Western Insurance Company, of Chicago, Illinois," approved February 4th, A. D. 1857, and as such corporation had full power and authority to make contracts for subscriptions to its capital stock, and to issue certificates therefor, and that by the terms of said act the capital stock of said company was fixed at five hundred thousand dollars; that said company had power
14 under its charter to make contracts of insurance and take risks on all kinds of property, and to charge and receive premiums therefor.

Plaintiff avers that afterwards, to wit, on the 25th day of June, A. D. 1870, said Great Western Insurance Company was reorganized by the stockholders and directors thereof, under the general incorporation acts of the State of Illinois, and its capital stock authorized to be increased to five millions of dollars; that said capital stock was divided into shares of one hundred dollars each, the subscription and payment for which stock constituted its only fund and means of paying the losses it might meet in the prosecution of its business; that by its charter said corporation was empowered to do any and all acts consistent with the constitution and laws of the State of Illinois.

That by the laws of the State of Illinois, in such case made, it was provided that the corporators of any insurance company organized in the State of Illinois should severally be liable for all debts and
15 responsibilities of such company to the amount of stock by him or them subscribed, until the whole amount of the capital stock of such company shall have been fully paid in and a certificate thereof recorded.

Plaintiff avers that the defendant, Daniel McLaughlin, is a citizen of the Territory of Wyoming, and a resident at Cheyenne, county of Laramie in said Territory, and that said defendant heretofore, to wit, on or about the 1st day of January, A. D. 1871, made and entered into a contract of subscription, and subscribed for ten shares of the capital stock of said Great Western Insurance Company of one hundred dollars each, and became indebted and obligated to pay therefor the full amount of said stock, to wit, the sum of one thousand dollars, as follows: Five per cent. of said sum to be paid down or upon delivery of certificates of the stock subscribed for; five per cent. in three months from the date thereof; five per cent. in six months from the date thereof; and five per cent. in nine months from the date thereof, and the balance, to wit, eighty per cent. thereof,
16 whenever lawfully called upon therefor, according to the charter of said company and the laws of the State of Illinois, under which said organization existed.

Plaintiff avers that said Great Western Insurance Company did execute and deliver to said defendant certificates for ten shares of its capital stock, in pursuance of said subscription, and that said defendant has received and accepted the same and has paid thereon the sum of two hundred dollars, or twenty per cent. of said subscription, and no other or further sum; whereby the said defendant became, and ever since has been, a stockholder in said Great Western Insurance Company, subject to all the rights, privileges, and profits enuring to the stockholders thereof in proportion to the shares of stock held by him, and in like manner subject to all the burdens and liabilities of the stockholders in said company.

Plaintiff shows that on the faith of said subscription for stock by said defendant and other subscriptions of like nature in pursu-
17 ance of its increase of stock as aforesaid the said Great Western Insurance Company obtained faith and credit with the public, and was enabled to make contracts for insurance, and to receive large sums for premiums upon risks insured and policies issued. That in pursuance of the requirements of the statute of the State of Illinois in such cases made and provided the amount so unpaid of defendant's stock subscription, together with the unpaid subscriptions of all and singular the other stockholders in said Great Western Insurance Company, were, by the officers and agents of said Great Western Insurance Company, reported to the auditor of state of the State of Illinois, and said company otherwise made public and advertised the same as assets and available resources of said company, upon the faith of which statements so made to the public through said state department and otherwise, said company obtained public faith and credit, and was enabled to extend its business and procure contracts of insurance, and did receive premiums to a large amount for the use and benefit of its
18 said stockholders.

Plaintiff avers that afterwards, to wit, on the 3rd day of January, A. D. 1872, to wit, at Chicago, in the State of Illinois, in consequence of great losses which said insurance company had prior to that

time sustained by fire in said city of Chicago aforesaid and elsewhere, its entire cash capital and assets were exhausted, and said company became liable to its policy-holders to an amount greatly exceeding all its cash funds and means of payment, and in an amount largely in excess of all sums that can be collected on its entire unpaid capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof the said insurance company, by a vote of its directors and stockholders duly convened for that purpose, to wit, on the day and year aforesaid, to wit, at Chicago, in the State of Illinois aforesaid, duly assessed, called in, and ordered paid, to wit, twenty per cent. on the then remaining unpaid eighty per cent. on each share of stock so held by its stockholders on said unpaid capital stock, of which the said stockholders
19 then and thereafter had notice, and which said sum so assessed, called in, and ordered to be paid is still due and owing from said defendant.

Plaintiff avers that afterwards, in consequence of its losses so sustained as aforesaid and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy on the 17th day of January, 1872, by Richard M. Hooley against the said Great Western Insurance Company was afterwards, to wit, on the 6th day of February, A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, in pursuance of the act of Congress of the United States in such case made and provided, as by the records thereof, now remaining in said court, will more fully and at large appear.

Plaintiff avers that on the 11th day of April, A. D. 1872, the said Clark W. Upton, plaintiff, was duly appointed assignee in bankruptcy of the estate of the said Great Western Insurance Company in
20 conformity with law, and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, bankrupt as aforesaid, was executed in due form of law under the hand and seal of Homen N. Hibbard, esq., register in bankruptcy for the first Congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, and effects of the said bankrupt.

Plaintiff avers that the said district court of the United States, sitting in bankruptcy, in and for the northern district of Illinois, on the application and petition of the said Clark W. Upton, assignee of the estate of the said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record in said court a call upon the stockholders of said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt, severally held by them and each of them, and ordered the same paid as hereinafter set forth; which said call and order of payment was of the following letter and
21 effect, to wit:

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court showing that a large amount of capital stock of the said bankrupt remains unpaid

in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proved against the estate of said bankrupt, and upon the investigations of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to the said assignee, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof, that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publica-
22 tion or otherwise.

And the plaintiff assignee, as aforesaid, avers that notice in accordance with the terms and conditions of said order was duly given to the stockholders of said bankrupt as therein and thereby required.

Plaintiff further avers that personal notice of said order has been heretofore duly given to said defendant, and demand made of payment of the amount due and ordered to be paid as aforesaid, to wit, the sum of eight hundred dollars, or eighty per cent. of the amount of stock subscribed by said defendant, and the said defendant has wholly refused to pay the said sum or any part thereof.

Wherefore plaintiff brings this suit and asks judgment against said defendant for said sum of eight hundred (800) dollars, with interest at twelve per cent. from the 15th day of August, A. D. 1872, and for costs of suit.

E. P. JOHNSON,
Attorney for Plaintiff.

I hereby sign as security for costs in the above case.

C. W. RINER.

23 Approved this 19th day of February, A. D. 1877.

J. W. BRUNER,
Clerk Dis't Court.

(Endorsed on the back as follows, to wit:) District court for the 1st judicial district. Doc. 2. No. 515. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Daniel McLaughlin. Petition. Filed April 8th, 1876. J. W. Bruner, clerk, by J. R. Whitehead, deputy clerk. E. P. Johnson, att'y for pl'ff.

And thereafter, to wit, on the 28th day of June, 1876, came the said defendant and filed his amended answer herein in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Laramie, ss:

In district court, first judicial dist.

24 *Amended answer.*

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
vs.
DANIEL MCLAUGHLIN, DEF'T.

The defendant above named, by leave of court first had and obtained, files this his amended answer, and answering the petition of the plaint-

iff herein denies each and every allegation therein contained, except the allegation that the Great Western Insurance Company is a corporation created and existing under and by virtue of the laws of the State of Illinois, and the allegation that said corporation has been declared a bankrupt, and the allegation that Clark W. Upton is the assignee of said bankrupt corporation, and the allegation that said defendant is a resident of Wyoming Territory.

Defendant specially denies that he is indebted to the plaintiff or to the Great Western Insurance Company in any manner or in any sum of money whatever.

2. This defendant further answering said petition, and for a
25 further defence thereto, says:

That on or about the date in said petition alleged this defendant subscribed for ten shares of stock in the said Great Western Insurance Company, and that the contract of subscription was in writing, and was in the words and figures following, to wit:

"Know all men by these presents that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill's, received by me, I am held and firmly bound and agree to pay the Great Western Insurance Co., of Chicago, the sum of two hundred dollars in installments as follows: Twenty-five per cent. thereof on receipt of stock certificate; twenty-five per cent. in three months from date hereof; twenty-five per cent. six months from date hereof; twenty-five per cent. nine months from date, with interest ten per cent. after due.

"Cheyenne, February 6th, 1871.

"DANIEL McLAUGHLIN."

26 Which said contract was the only one ever made and entered into in reference to the said ten shares of stock.

Defendant further says that in accordance with the terms of said written contract he paid to said Great Western Insurance Company the said sum of two hundred dollars from the date of entering into the same, up to and including the 19th day of August, 1871; that said contract was then delivered up to this defendant with the payments indorsed thereon by the secretary of said company.

Defendant further says that this was the only stock transaction that he ever had with the said Great Western Insurance Company.

3. For a further defense to said action, defendant says he was at the time of entering into said contract, and ever since has been, a resident of Wyoming Territory, and was not bound to know the laws of the State of Illinois, and did not know them; that the said Great Western Insurance Company represented to this defendant at the time he
27 was solicited to make the foregoing contract that the said ten shares of stock would be forever non-assessable, and that this defendant would never be called upon or be liable for any other sum of money, by reason of said contract and the ten shares of stock, except the sum of two hundred dollars aforesaid; that relying upon said statement and representation, and believing that such representation was truthfully made, this defendant entered into the subscription contract aforesaid, and fulfilled the same.

Defendant, further answering, says that the representations of said Great Western Insurance Company so made as aforesaid to induce this defendant to enter into said contract were false and fraudulent when made, and have continued to be so until the present time, and that they were known to said Great Western Insurance Company to be false and fraudulent when so made.

4. For a cause of action against said Great Western Insurance Company, and as an offsett to plaintiff's claim, this defendant alleges
28 that the said Great Western Insurance Company before it was adjudged bankrupt was indebted to this defendant on a balance due upon account in the full sum of $341.25, which amount with legal interest thereon since Sept., 1872, is still due to this defendant from said Great Western Insurance Company.

Wherefore defendant prays judgment against said plaintiff for $341.25, with legal interest since September, 1872.

DANIEL McLAUGHLIN,
Defendant.

29 (Copy of account sued on.)

Great Western Insurance Company in ⅌ with Daniel McLaughlin.

1871.

June 6.	To retainer in suit on note for $538.97, Gr. W. Ins. Co. vs. H. A. Pierce and L. Murrin & Co	50 00	
June 10.	" legal services in re Territory vs. H. A. Pierce, ch'g embezzlement	25 00	
June 19.	" legal services, action in replevin in Gr. W. Ins. Co. vs. H. A. Pierce in dist. court	50 00	
July 17.	" legal services, action in replevin in dist. court Gt. W. Ins. Co. vs. H. A. Pierce	50 00	
Aug. 9.	" legal services in dist. court, trial on note $538.97, judg't in action in favor H. A. Pierce vs. G. W. Ins. Co., $1,158.05	100 00	
			275 00

CR.

Aug. 19.	By am't subscription to capital stock Gr. W. Ins. Co		200 00
	Bal. due		75 00
Oct. 24.	To legal services before Judge Fisher, resisting proceedings in aid of execution, T. A. Kent garnisheed	50 00	50 00
	Carried forward		125 00

30

1871.	Am't bro't forw'd		$125 00
Oct. 27.	To legal services in second action on note, $538.97, begun this date, judg't $589.75	150 00	
Oct. 30.	" legal services before Judge Fisher, resisting 2d proceedings in aid of execution, T. A. Kent garnisheed	50 00	
Nov. 3.	" legal services in district court, action to vacate judg't, $1,158.05, favor Pierce.	50 00	

1872.			
Jan. 30.	" legal services in sup. court prosecuting writ of error in Pierce judg't of $1,158.05, judg't reversed and case dismissed	250 00	
Jan. 31.	" legal advice and assistance relative to insurance claims H. Altman, Laramie City and Church Howe, Cheyenne, and in relation to sundry matters in Wyoming and Utah	200 00	
Feb. 1.	" use of office for about one year for meeting of directors and agent	100 00	800 00
	Carried for'd		925 00
31	Am't bro't forw'd		925 00
	To legal services in conjunction suit to restrain collection of judg't $589.75, L. Murrin vs. Sheriff & G. W. Ins. Co	50 00	50 00
			975 00

1872.	CONTRA CR.		
Aug. 7.	By cash received from Sheriff Carr on judg't	300 00	
Sept. 13.	" cash received from clerk dist. court, bal. of judgment & int	333 75	
		633 75	
1872.			
Sept. 13.	Balance due D. McL	341 25	975 00

32 TERRITORY OF WYOMING,
County of Laramie, ss:

I, Daniel McLaughlin, being duly sworn, say I am the defendant in the foregoing case; I have read the foregoing answer and know its contents, and believe them to be true.

DANIEL McLAUGHLIN.

I, J. W. Bruner, clerk of said court, hereby certify that the foregoing affidavit was sworn to and subscribed before me and in my presence by Daniel McLaughlin this 28th day of June, A. D. 1876.

{ FIRST DISTRICT COURT, LARAMIE COUNTY, WYOMING TERRITORY. } J. W. BRUNER, *Clerk District Court.*

(Endorsed on the back as follows, to wit:) In dist. court. Clark W. Upton, assignee, &c., vs. Daniel McLaughlin. Amended answer. Filed June 28th, 1876. J. W. Bruner, clerk. Corlett & Street, att'ys for def't.

33 And thereupon and thereafter, on the same day, the plaintiff filed a demurrer herein to the second, third, and fourth defences in the amended answer, in the words and figures following, to wit:

In the district court of the 1st district in and for Laramie County.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, pl'ff,
vs.
DANIEL MCLAUGHLIN.

Now comes plaintiff above named and demurs to the 2nd defense in the amended answer of defendant, and for cause thereof says that the facts therein set up do not constitute a defense to the action of plaintiff.

E. P. JOHNSON,
Att'y for Pl'ff.

And the said plaintiff demurs to the 3rd defense set up in the amended answer of the defendant, for the reason that the facts therein stated do not constitute a defense to plaintiff's cause of action.

E. P. JOHNSON,
Attorney for Pl'ff.

34 And the said plaintiff also demurs to the fourth defense of defendant's amended answer, for the reason that the facts therein set forth do not constitute a defense, counter-claim, or set-off to the plaintiff's cause of action.

E. P. JOHNSON,
Att'y for Pl'ff.

(Endorsed on the back as follows, to wit:) Clark W. Upton, assignee, vs. Daniel McLaughlin. Demurrer to amended answer. Filed June 28th, 1876. J. W. Bruner, clerk. E. P. Johnson, att'y for pl'ff.

And thereupon and thereafter said cause came on to be heard by the court on the 30th day of June, 1876, upon the demurrer to the amended answer, and the court, after argument of counsel, and due consideration, on the 30th day of June, 1876, sustained said demurrer to the fourth defense of said amended answer, to which ruling of the court the defendant then and there excepted.

And on this day, to wit, June 30th, A. D. 1876, it being one of the days of the May term, 1876, of said court, the following entry
35 was made in the journal of said court, to wit:

May term, 1876, Friday, June 30th, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company, bankrupt,
vs.
DANIEL MCLAUGHLIN.

Now comes the parties herein, by their respective attorneys hereinbefore named, and the court having had the argument of counsel upon the demurrer of the plaintiff to defendant's amended answer, herein filed, under consideration, and being now well advised in the premises, overruled said demurrer to the second and third defences in said answer, to which ruling of the court said plaintiff, by his counsel, excepts, and the court sustains said demurrer to the fourth defense in said amended

answer, to which ruling of the court said defendant, by his counsel, excepts.

And afterwards, to wit, on the 13th day of December, 1876, at the November term of said district court, said cause came on for
36 trial, and the following-named jurors were duly empannelled and sworn to try the issues in the case:

November term, 1876, Wednesday, December 13th, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Co.,
vs.
DANIEL MCLAUGHLIN.

Come now the parties to this action in person and with their respective attorneys, to wit, C. W. Upton and E. P. Johnson, esq'r's, for plaintiff, and W. W. Corlett and Thomas J. Street, esq'r's, for defendant, and all parties being ready for trial, thereupon came a jury in this case composed of the following-named persons, to wit: J. H. Horton, Joseph Lowe, E. W. Stewart, W. J. Jones, R. H. Kipp, D. Fisk, R. V. Hatham, C. A. Cole, Fred. Shodl, Wm. Lindenmeier, Fabien Moreaux, and A. R. Warner, twelve good and lawful men from the body of Laramie County, who were then and there tried, accepted, impannelled, and sworn to try the issues herein joined according to the law and evidence, and to render a verdict accordingly; and thereupon the
37 trial of this case and the taking of testimony therein is proceeded with, and the same not being concluded when the hour for adjournment arrived, by consent of parties the jury herein are allowed to separate until the convening of court to-morrow morning.

And thereupon came the plaintiff, and to maintain the issues on his part he offered in evidence to be read to the jury a copy of the original charter of the Great Western Insurance Company certified by the secretary of the State of Illinois, to the introduction of which as evidence the defendant at the time objected, because the same was irrelevant and immaterial, and also because the same was incompetent under Article IV, Chapter XXXIV, "Foreign Corporations," page 245, Compiled Laws of Wyoming, not being a certified copy of the charter required by law to be filed in the office of the register of deeds of Laramie County, Wyoming Territory.

The court overruled the objection to the copy of the original
38 charter offered, and the same was received in evidence and read to the jury, to which ruling of the court the defendant then and there excepted. The said copy of the original charter is in the words and figures following, to wit:

No. 1. An act to incorporate the Great Western Insurance Company.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the general assembly, that William W. Danenhower, Jacob Russell, Thomas Hale, George Ely, Robert H. Foss, and their successors, assignees, and associates be and are hereby created a body corporate and politic under the name and style of The Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations

have, and be recognized in all courts of justice and equity in this State.

39 SECTION 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in as a company fund five per cent. on the amount subscribed, and securing the balance to be paid on demand or otherwise by approved judgment notes, by hypothecated stock mortgages on real estate in Cook County or other satisfactory security, and shall have chosen nine directors, and these directors shall have chosen one of their number president, and appointed a secretary and treasurer, it shall be deemed fully organized and enjoy the powers herein conferred.

SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums therefor as may be agreed upon by and between the parties either upon mutual or stock principle or both.

40 SEC. 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottomry, and respondentia, in bonds and mortgages or personal security at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

SEC. 5. The said company may establish agencies, and do all acts not inconsistent with the constitution of this or the United States necessary to and for the full use and enjoyment and to carry out the full object of this act.

SEC. 6. This act shall be deemed a public act and be liberally construed for the purposes therein contained, and take effect from and after its passage.

(Signed) SAM'L HOLMES,
Speaker House of Rep's.
JOHN WOOD,
Speaker of the Senate.

41 Approved Feb. 4th, 1857.

WM. H. BRISSELL.

I, George H. Harlow, secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law of the State of Illinois entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved Feb'y 4th, 1857, the original of which said enrolled laws is now on file in this office.

In witness whereof I hereunto set my hand and affix the great seal of State, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] (S'g'd) GEORGE H. HARLOW,
Secretary of State.

STATE OF ILLINOIS,
Office of the Secretary of State, ss:

I, George H. Harlow, secretary of state of Illinois, do hereby
42 certify that it appears from articles on file in this office that on the 22nd day of August, A. D. 1870, the capital stock of the said Great Western Insurance Company of Chicago, Illinois, was, by the action, consent, and request of its stockholders and board of directors, authorized to be increased to the sum of five million dollars; and the fourth section of the original act of incorporation of said company was thereby amended and altered so that its capital stock might be increased to five million dollars, in conformity to an act of the general assembly of the State of Illinois entitled "An act to incorporate and to govern fire,

marine, and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, which said article is now on file in this office.

In witness whereof I hereunto set my hand and affix the great seal of State. Done at Springfield, this 18th day of April, A. D. 1876.

[SEAL.] (S'g'd) GEO. H. HARLOW,
Secretary of State.

43 And thereupon the plaintiff offered in evidence a copy of the proceedings to increase the capital stock, to which the defendant objected on the grounds that the same was immaterial, irrelevant, and incompetent; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The copy was then read to the jury, and was in the words and figures following, to wit:

Doc. No. 2.

No. 2.

UNITED STATES OF AMERICA,
State of Illinois, ss:

OFFICE OF SECRETARY OF STATE.

I, George H. Harlow, secretary of state of the State of Illinois, do hereby certify that I have examined the foregoing copies of papers in the matter of the increase of capital stock of the Great Western Insurance Company of Chicago, Illinois, and the attestation thereto annexed of the auditor of public accounts of the State of Illinois; that the said attestation is in due form and in accordance with the
44 law of the State of Illinois; that the said attestation is made by the proper officer, the auditor of public accounts of said State, who is by the laws of said State the custodian of the original thereof, and duly authorized to certify and exemplify copies of the same; and that his signature attached to said attestation is genuine.

In testimony whereof I have hereto set my hand and affixed the great seal of State, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] (S'g'd) GEO. H. HARLOW,
Secretary of State.

[Blank 22.]

STATE OF ILLINOIS,
Auditor's Office, Department of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that I have compared the annexed
45 copies of papers in the matter of the increase of capital of the Great Western Insurance Company of Chicago, Illinois, with the original on file in this office, and that the same are correct transcript therefrom and of the whole of said originals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] (S'g'd) C. E. LIPPINCOTT,
Auditor of Public Accounts.

A.

STATE OF ILLINOIS,
Department of Insurance, Auditor's Office:

OFFICE OF THE GREAT WESTERN INSURANCE COMPANY,
Chicago, Illinois, August 22d, 1870.

We, the undersigned directors of the Great Western Insurance Company of Chicago, Illinois, being duly sworn according to law,
46 depose and say, and each for himself says, that we compose a majority of the directors of the Great Western Insurance Company of Chicago, Illinois, aforesaid; that said Great Western Insurance Company has a capital stock of five million dollars, divided into fifty thousand shares of one hundred dollars; one million and twelve thousand dollars of said capital is subscribed; and that eighteen & $\frac{33}{100}$ (averaged) dollars upon each share, amounting in the aggregate to one hundred and eighty-six thousand three hundred and thirty-five & $\frac{93}{100}$ dollars, has been paid in by the several holders of the stock of said company, and said money has been paid in, in cash, by the stockholders towards the payment of their respective shares, and not for any other purpose whatever, and it is intended that the same shall remain as the capital of the company, and that the same is now invested as required by the laws of this State.

H. L. STEWART.
JAMES MONTGOMERY.
H. H. PECK.
J. D. WOODWARD.
R. J. WATERS.
C. D. HOOKER.
47 CHAS. J. STOKES,
WASHINGTON LIBBY.
CHAS. B. SMITH.
A. J. PECK.
M. SMITH.
G. M. ARCHIBALD.
J. M. W. JONES.
E. EUGENE CALDWELL.
W. U. STURGESS.
CHAS. V. DYER.
J. McK. SAWYER.
L. S. MAJOR,
$5,000 stock, 20 % paid in.

Subscribed and sworn to before me by each of the subscribers hereto on this 22nd day of August, 1870.
Given under my hand and official seal.
[SEAL.] GEORGE C. CHRISTIAN,
Notary Public.

B.

Notice.

The Great Western Insurance Company of Chicago, Illinois, hereby give notice that it is the intention to increase the capital stock to five million dollars, three-fourth' in amount of the stockholders thereof having given their written consent to such measure.

H. L. STEWART, *President.*

proof of publication, and the accompanying papers in the matter of an increase of capital of the Great Western Fire Insurance Company of Chicago, Illinois, to five millions of dollars, and I find said papers conformable to the act of the general assembly of the State of Illinois approved March 11, 1869, and entitled "An act to incorporate and to govern fire, marine, and inland-navigation insurance companies doing business in the State of Illinois," and not inconsistent withthe laws and constitution of the State of Illinois.

W. BUSHNELL,
54 *Attorney-General of Ills.*

To Gen'l C. E. LIPPINCOTT,
Auditor P. A., Springfield, Ills.

AUDITOR'S OFFICE, ILLINOIS,
BUREAU OF INSURANCE,
Springfield, April 18, 1876.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify from papers in this office that on the 22nd day of August, A. D. 1870, the capital stock of the Great Western Insurance Company of Chicago, Illinois, was, by the action, consent, and request of its stockholders and board of directors, authorized to be increased to the sum of five million dollars, and the fourth section of the orignal act of incorporation of said company was thereby amended and altered so that its capital stock might be increased to five million dollars, in conformity to an act of the general assembly of the State of Illinois approved March 11, 1869.

In testimony whereof I hereunto subscribe my name and affix
55 the seal of my office, at Springfield, the day and date first above written.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*

UNITED STATES OF AMERICA,
State of Illinois, Office of Secretary, ss:

I, George H. Harlow, secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of the proceedings of the Great Western Insurance Company of Chicago, Illinois, increasing their capital stock to five million dollars, also a copy of the charter and amendment thereto of said company now on file in this office.

In witness whereof I hereto set my hand and affix the great seal of State, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] GEO. H. HARLOW,
Secretary of State.

56 And thereupon the plaintiff offered in evidence a certified copy of the annual statement of the auditor of the State of Illinois, to which the defendant at the time objected because the same was irrelevant and incompetent.

The court overruled the objection, and the defendant then and there excepted.

The certified copy was then read to the jury, and was in the words and figures following, to wit:

No. 3.

UNITED STATES OF AMERICA,
State of Illinois, Office of Secretary of State, ss:

I, George H. Harlow, secretary of state of the State of Illinois, do here

by certify that I have examined the foregoing statement of the affairs of the Great Western Insurance Company of Chicago, Illinois, and the attestations thereto annexed of the auditor of public accounts of the
57 State of Illinois; that the said attestation is in due form and in accordance with the laws of the State of Illinois; that the said attestation is made by proper officer, the auditor of public accounts of said State, the custodian of the original thereof, and duly authorized to certify and exemplify copies of the same, and that his signature attached to said attestation is genuine.

In witness whereof I have hereunto set my hand and caused the great seal of the State to be affixed, at the city of Springfield, this 18th day of May, A. D. 1876.

{ GREAT SEAL OF THE STATE OF ILLINOIS. } (S'g'd) GEO. H. HARLOW,
Secretary of State.

AUDITOR'S OFFICE, ILLINOIS,
Bureau of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that on the twenty-seventh day of January, A. D. 1871, I made an examination of the affairs of the Great
58 Western Insurance Company of Chicago, Illinois, by Lotus Niles, esq., my agent, duly appointed by me in conformity to law, and that the annexed is a true and correct copy of the report of said Lotus Niles concerning said examination.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, this 18th day of April, 1876.

{ SEAL OF AUDITOR'S OFFICE. } (S'g'd) C. E. LIPPINCOTT,
Auditor P. A.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE,
Springfield, Jan'y 19, 1871.

To LOTUS NILES, Esq., *Springfield:*

SIR: In pursuance of the provisions of the act of the general assembly of the State of Illinois entitled "An act to incorporate and to govern fire, marine, and inland-navigation insurance companies
59 doing business in the State of Illinois," approved March 26th, 1869, you are hereby appointed and authorized to examine the capital, securities, and affairs of the Great Western Insurance Company of Chicago, in the State of Illinois, and make report to me, under your own oath and the oaths of the president and secretary of said company, according to the forms annexed to this appointment.

In testimony whereof I hereunto subscribe my name and affix my seal of office the day and year first above written.

[AUDITOR'S SEAL.] (S'g'd) C. E. LIPPINCOTT,
Auditor of Public Accounts.

To the Hon. C. E. LIPPINCOTT,
Auditor of Public Accounts of the State of Ills.:

The undersigned, in pursuance of the appointment hereto annexed, bearing date the 19th of January, A. D. 1871, has personally made an examination of the capital, securities, and affairs of the Great Western Insurance Company of the city of Chicago, in the State of Illinois,
60 an insurance company claiming to have complied with all the requirements of said act, and hereby certifies that the capital of said

company, as fixed by its charter, is thousand dollars, of which there has been two hundred & twenty-two thousand & eight hundred & thirty-one $\frac{42}{100}$ ($222,831.42) dollars paid in, and is now possessed by said company in money or in the stocks, bonds, and mortgages required by said act aforesaid as part of the assets of the company, as shown in Schedule A hereunto annexed; and the statement of the affairs of the company, as sworn to by the president and secretary of the company, and attached hereto and marked Schedule B, has been carefully compared by me with the books, vouchers, papers of the company, as now on file in the company' office, and I find said statement in every particular to be correct, except as modified or changed in Schedule A & B hereto attached, and the officers of said company have furnished me satisfactory evidence that the company in its own right is possessed of all the assets and property as claimed in said statement.

61 In testimony whereof I hereto subscribe my name, this 27th day of January, A. D. 1871.

(S'g'd) LOTUS NILES.

STATE OF ILLINOIS, *County:*

I, Lotus Niles, do solemnly swear that the foregoing report subscribed by me is true in every particular, to the best of my knowledge, information, and belief.

(S'g'd) LOTUS NILES.

Sworn to before me and subscribed in my presence by the above-named Lotus Niles, this 27th day of January, A. D. 1871.

Given under my hand and official seal.

[NOTARIAL SEAL.] (S'g'd) RUSSELL J. WATERS,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

Russell J. Waters and Chester D. Hooker do solemnly swear that said Russell J. Waters is the vice-president and said Chester D.

62 Hooker is the secretary of the Great Western Insurance Company above named; that said company is organized in good faith for the purpose of transacting the business of fire insurance at Chicago, in the State of Illinois; that the securities and property exhibited by them as the assets of said company to the above-named Lotus Niles (who was appointed by the auditor to examine the same) are truly set forth and specified in Schedule A hereto annexed, and are bona fide the property of and now owned and possessed by said company in its corporate capacity; that no part of said assets has been withdrawn, pledged, or in any manner impaired, nor loaned or advanced to said company for the purpose of being exhibited as part of its assets.

(S'g'd) RUSSELL J. WATERS,
Vice-Pres't.

(S'g'd) C. D. HOOKER, *Secretary.*

Sworn to by the said Russell J. Waters and Chester D. Hooker before me, and subscribed by them in my presence, this 27th Jan., 1871.

(S'g'd) LOTUS NILES.

63 *Schedule A, containing a particular description of all the actual assets owned by the Great Western Fire Insurance Company on the 31st day of Dec'r, 1870.*

	Dollars.	Cents.
Amount of cash in hand in company's office, as shown by the company's books	428	97
Amount of cash deposited in the Third National Bank of Chicago, verified by the books of the bank	4,874	50
Amount of cash in hands of agent, and in course of transmission—this is the balance due of agents' accounts since Oct., 1870—the largest portion of which is of the month of Dec., 1870, and is probably good	35,800	55
Loans on bonds and mortgages on which less than one year's interest is due, duly recorded and being first liens on fee simple, as per Schedule B. The amount of said loans on real estate lying in the State of Illinois is (and evidence of record and value was exhibited, and in the case of all taken since previous examination abstracts of title were furnished) the sworn statement of I. T. Foster and Geo. W. Parker and freeholders of Chicago, verified the value placed on No. 77099 of the schedule.	162,100	00
The statement of Harlan H. Peck was received as to the value of No. 73889 & 73275, affidavits—		
Am't forward	203,204	02

64 *Schedule A*—Continued.

Amount brought forward	203,204	02
affidavits were furnished to the balance of the property. The amount of said loans on real estate lying in the State of Iowa is $21,075.00; the usual evidence of record is endorsed on the mortgages, and a sworn statement of three citizens of Iowa was furnished, but not under oath, as to the lands in Clayton and Chickasaw Counties; no abstracts of title or certificates thereof were furnished; I called the attention of the co. to sec. 8 of the insurance law, which, in effect, prohibits loans on real estate lying out of this State; I have not thought it best, from the foregoing facts, to extend this amount.		
2 Chicago West Side City park bonds, 8%, No. 154, $200 and 156, $160.00	360	00
9 Chicago N. W. land certificates, No. 490, $480.00; #513, $1,920; 520, $1,860; 512, $960; 503, $960; 510, $960; 495, $480; 499, 480$;	4,530	00
Amount of interest on notes for premiums due	583	91
Interest accrued, but not due on bonds, mortgages, including interest, on Iowa mortgages	10,345	25
Am't forw'd	210,023	18

65 *Schedule A*—Continued.

Am't bro't forward	200,023	18
Bill' receivable held by the company considered good, viz, stock notes drawing no interest	7,495	00
Notes for premiums, mostly for current business in 1870..	8,528	13

Amount of United States internal-revenue stamps on hand	51 25
Amount of all other property belonging to the company, consisting of the following items:	
Office furniture	1,569 47
Horse, buggy, & outfit	650 00
Charter expenses $2,000.00; this item I do not value.	
Amount due from "city collections" for brokerage, money loaned, stock, &c, being ledger balances	11,503 83
	248,820 86

NOTE A.—The gross amount of cash actually received during the year for premiums includes the amount in the hands of ag'ts and in the course of transmission.

NOTE B.—Amount paid during the year for salaries, fees, and all charges of officers and directors of the company includes the salaries of general agents.

66 NOTE C.—Amount paid during the year for national taxes and dues includes the amount paid for stamps, taxes, $327.06, rev. stamps, 1,171.63.

NOTE D.—"General expense supplies and advertising" embraces the following items, viz: Stock com's, $7,987.10; advertising, $950.91; charter, $2,000.00; supplies, $4,917.59; interest, $1,172.82; foreign expend. $5,272.53; city expenses, $3,527.97; office furniture and fixtures, $2,219.47; sundry expenses not included in the foregoing, $5,592.89; profit and loss, $37.50.

(S'g'd) LOTUS NILES.

67 STATE OF ILLINOIS,
Auditor's Office, Department of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that I have compared the annexed copy of the annual statement of the condition of the Great Western Insurance Company of Chicago, Illinois, for the year ending Dec. 31, 1870, made to this office pursuant to law with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original statement.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL AUDITOR'S OFFICE.] (S'g'd) C. E. LIPPINCOTT,
Auditor of Public Accounts.

68 *Annual statement of the Great Western (Fire) Insurance Company of Chicago, in the State of Illinois, for the year ending on the 31st day of December, 1870, made to the auditor of public accounts of the State of Illinois, pursuant to the laws of said State.*

CAPITAL.

The amount of capital stock of the company now outstanding (par value of shares $100.00 each) is	1,168,000 00
The amount of paid-up capital	222,831 42
Amount of unpaid subscribed capital, for which the subscribers or holders are liable	965,168 58

ASSETS.

	$ c.	Dollars. Cents.
The amount of cash on hand in the company's office	410 16	
The amount of cash deposited in the 3rd National Bank	6,022 37	
The amount of cash deposited in the Wilkins & Stone's Bank	10,600 00	
The amount of cash in hands of agents and in course of transmission	26,300 55	
Total cash		43,333 08
Loans on bonds and mortgages (duly recorded and being first liens on the fee simple) upon which less than one year's interest is due, as per Schedule B		183,175 00

The amount of stocks of the State of Illinois, of stocks and Treasury notes of the United States, of stocks and bonds of incorporated cities in the State of Illinois, and of all other stocks and bonds absolutely owned by the company:

	Total par value.	Total market value.	
Chicago West Side city park bonds, 8 %	360 00	360 00	
C. and N. W. R. R. land certificates	9,060 00	4,530 00	
Total par and market value (carried out at market value)	9,420 00	4,890 00	4,890 00
Interest accrued, but not due			10,345 25
Bills receivable held by the company, considered good			16,607 04
Amount of United States internal-revenue stamps on hand			51 25
Amount of all other property belonging to the company, consisting of the following items:			
Office furniture, horse, buggy, and outfit, & personal property			4,219 47
Due from insurance companies and city collections			11,503 83
The aggregate amount of all the actual available assets of the company			274,124 92

69 LIABILITIES.

	Dollars. Cents.	Dollars. Cents.
Amount of losses adjusted but not due	1,417 68	
Amount of losses incurred during the year, including those claimed and not yet due and including those reported upon which no action has been taken	3,183 71	
Total amount of losses unpaid, including those unadjusted, reported, & resisted		4,601 39
Amount of unearned premiums or premiums received on unexpired risks	80,838 69	
Amount required to safe reinsure all the outstanding risks of the company, estimated at an average of 40 per cent. of unexpired premiums		32,335 47
Amount of all other claims against the company, consisting of the following items:		
Bills payable		1,634 09
Aggregate amount of all unpaid losses, claims, and liabilities (except capital stock)		38,570 95

INCOME.

	For fire risks. Dollars. Cents.	Dollars. Cents.	Dollars. Cents.
Gross amount of cash actually received during the year for premiums	74,996 58		
Deduct am't paid for reinsurance, and amount paid to the insured for drawbacks and return premiums	2,245 19		
Total net amount of cash actually received during the year for premiums (carried out)		72,751 39	
Premium on risks written during the year not actually paid in cash during the year, including all premiums paid by notes or bills upon which cash has not been received during the year (carried inside)	8,087 30		
Aggregate amount of income actually received during the year in cash			72,751 39

EXPENDITURES.

	For fire risks. Dollars. Cents.	Dollars. Cents.
Amount paid for losses which occurred during the year, deducting savings and salvage	5,344 11	
Total amount actually paid during the year for losses		5,344 11
Amount paid during the year to agents, brokers, and persons other than officers and directors of the co. for commissions on premiums		5,966 64
Am't forward		11,310 75

70 EXPENDITURES—Continued.

Amount br 't forward	11,310 75
Amount paid during the year for salaries, fees, and all charges of officers and directors of the company	11,985 99
Amount paid during the year for national taxes and duties	1,498 69
General expenses and supplies, adv	33,678 78
	58,474 21

MISCELLANEOUS.

	Fire risks. Dollars. Cents.	
Gross amount of risks written during the year	4,199,939 96	
Deduct amount of reinsurance effected thereon	30,500 00	
Net amount of risks written during the year		4,169,439 96

	Having not more than one year to run.	Having more than one and not more than three years to run.	Having more than three years to run.	
	Dollars. Cents.	Dollars. Cents.	Dollars. Cents.	
Amount of fire risks in force at the end of the year	3, 922, 931 63	170, 945 00	75, 563 33	
Aggregate amount of risks in force Dec. 31st, 18				4, 169, 439 96

Total amount loaned to directors of the company on bond and mortgage stock and loans.. 143, 800 00
The least amount of the company's stock owned by any one of the directors at its par value is. 500 00
The total amount of the company's stock owned by all of the directors at its par value is... 719, 000 00

The par value of the stock of the company per share is $100.00; market value per share is $20.50.
Are dividends declared on premiums received for risks not terminated? Yes.
The number of agents employed by the company in the State of Illinois is 93; in other States .
The principal office of the company is located at Chicago, Cook Co., Ills.
The company was incorporated Feb'y 4th, 1857; commenced business, June 27th, 1870; the duration of the charter is perpetual years.

	Fire risks.	
	Dollars.	Cents.
Companies will please state:		
Amount of risks taken during the past year in the State of Illinois	2, 010, 135	16
Amount of premiums received during the past year in the State of Illinois	33, 373	16
Amount of losses incurred during the past year in the State of Illinois	3, 568	92

70½ STATE OF ILLINOIS,
County of Cook, ss:

H. L. Stewart, president, and C. D. Hooker, secretary, of the Great Western Company, being duly sworn, depose and say, and each for himself says, that they are the above-described officers of the said company, and that on the 31st day of December last all of the above-described assets were the absolute property of the said company, free and clear from any liens and claims thereon except as above stated, and that the foregoing statement, with the schedules and explanations hereto annexed, and by them subscribed, are a true, full, and correct statement of the condition and affairs of the said company on the 31st day of December last, and for the year ending on that day, according to the best of their information, knowledge, and belief, respectively.

[COMPANY'S SEAL.] (S'g'd) H. L. STEWART,
President.

(S'g'd) C. D. HOOKER,
Secretary.

Subscribed and sworn to before me this 10th day of January, 1871.

[NOTARIAL SEAL.] (S'g'd) HENRY WISNER,
Notary Public.

SCHEDULE B.—*Containing a description of all the bonds and mortgages owned by the Great Western Insurance Company on the 31st day of December, 1870, the amount of principal unpaid thereon, with the company's valuation of the mortgaged premises, the amount for which the company hold fire insurance policies on the buildings as collateral security, and the location and dimensions of the lands, with the size and descriptions of the buildings.*

No.	Names of mortgagors.	Date of mortgage.	Mortgages recorded. In county of—	Book of mortgages.	Page.	Amount of principal unpaid.	Valuation of premises, incl'd'g buildings.	Am't of insurance held by co. on the buildings.	Location (street and number).	Quantity or dimensions of land, and size and description of buildings.
54636	H. L. Stuart	June 1st, 1870	Cook	134	372	40,000 00	62,000 00	.....	Sect. 1, R. 13, T. 38	38 acres, South Chicago.
12479	Abner Peck	Ap'l 28th, "	Knox	12	479	10,000 00	20,000 00	6,000 00	" 3 " 3, " 13	160 " Knox Co., Ill's.
54162	J. M. W. Jones	May 1st, "	Cook	137	360	10,000 00	15,000 00	.....	" 17 " 14, " 40	Blocks 25 & 26, Chicago.
53251	A. N. Waterman	" " "	"	134	359	2,000 00	3,000 00	.....	Block 22, lot 2	W. Chicago.
52905	S. C. Chamberlain	Ap'l 21, "	Winnebago	43	293	2,500 00	4,000 00	.....	Sect. 23, R. 1, T. 44	Lots 1, 2, 3, 4, 5, 6, & 8.
52907	Harlan H. Peck	M'ch 22, "	Cook	134	355	3,600 00	5,400 00	.....	" 6, " 14, " 39	" 8, 9, 2, 3, 3, 1, 2.
52906	E. Eugene Caldwell	Ap'l 14, "	"	145	394	3,600 00	5,400 00	.....	" 6, " 14, " 39	Block 123, lots 7, 1, 1, 2, 18.
52908	Russell J. Waters	M'ch 10, "	"	134	356	1,800 00	2,800 00	.....	" 6, " 14, " 39	Lots 10, 11, 11, Chicago.
52908	A. N. Waterman	Ap'l 23, "	"	145	395	3,600 00	4,500 00	.....	" 6, " 14, " 39	" 4, 12, 13, 16, "
2921	C. D. Hooker	" 21, "	Lake	34	463	1,200 00	2,000 00	.....	Block 23	Lot 4, Highland Park.
54637	H. H. Peck	June 1, "	Cook	134	384	600 00	900 00	.....	Sect. 6, R. 14, T. 39	Lot 7, West Chicago.
54516	H. H. Peck	May 23, "	"	134	373	1,200 00	1,800 00	.....	" 6, " 14, " 39	Lots 4 & 5.
55134	O. P. Axtell	June 4, "	"	135	538	10,000 00	30,000 00	.....	" 14, 2012, 14, " 35	240 acres.
51808	M. Smith	May 9, "	"	134	347	10,000 00	15,000 00	.....	" 13, " 13, " 37	40 "
54263	A. S. Peck	June 3, "	"	134	365	10,000 00	22,000 00	.....	" 17 & 18, " 14, " 13	Block 14, 22 lots.
2954	J. D. Woodward	" 6, "	Lake	34	470	12,000 00	2,000 00	.....	Block 23	Lot 22.
45	S. C. Chamberlain	Nov. 13, "	Winnebago	29	310	3,000 00	5,000 00	.....	Sect. 14 R. 4, T. 20	160 acres.
68936	James Montgomery	Oct. 10, "	Cook	154	392	20,000 00	4,500 00	.....	" 15, " 14, " 38	Bl'k 3, So. Chicago.
74259	J. D. Woodward	Nov. 23, "	"	640	216	15,000 00	39,000 00	8,000 00	Lot 881, Bl'k 12	Riverside.
73389	J. D. Woodward	" 19, "	"	149	354	800 00	1,600 00	.....	Sect. 9, R. 14, T. 38	Block 1, lot 35.
73275	J. D. Woodward	" 15, "	"	154	359	2,000 00	4,000 00	.....	" 9, " 14, " 38	" 2, " 16.
77099	Mary C. Sanger	Dec. 16, "	"	155	32	10,000 00	30,000 00	.....	" 32, " 14 " 41	10 acres.
	J. W. Ellis	Aug. 27, "	Davis Co., Io	A	516	2,000 00	7,000 00	.....	Part SE. ¼ sect. 25, R. 70,	T. 14, & SE. ¼ of SE. ¼, S. 60, 70, 14.
	J. B. Glenn	" " "	" " "	"	518	2,000 00	4,500 00	.....	Lot 3, Bl'k 18	Bloomfield, Io.
	Baptist Hardey	" " "	" " "	"	514	1,000 00	2,000 00	.....	E. ½ of SW. ¼ sect. W. ½	
	E. G. Hardey	" " "	" " "	"	530	1,000 00	2,500 00	.....	of SW. ¼ sect. 30, 68, 13	
	Geo. Duffield	" " "	" " "	"	526	2,000 00	5,000 00	.....	Lot 16, Block 18	Bloomfield, Iowa.
	Wm. G. Davis	" " "	" " "	"	522	1,000 00	2,500 00	.....	E. ½ SW. ¼ S. 5, 68, 13	
	Amon Bronk	" " "	" " "	"	527	1,000 00	2,000 00	.....	Part NE. ¼, S. 4, 67, 13, &	SW. ¼ of SW. 35, 68, 13.
	J. R. Sheafer	" " "	" " "	"	525	1,000 00	2,700 00	.....	Lot 7, Block 18	Bloomfield, Iowa.
	Thos. Davis	" " "	" " "	"	521	2,000 00	4,000 00	.....	E. ½ SW. ¼ S. 5, T. 68, R.	13, 80 acres.
		" " "	" " "	"	519	2,000 00	5,000 00	.....	S. ½ SE. ¼ sec. 20, 69, 14, &	N. ½ NE. ¼, sec. 29, 69, 14.

SCHEDULE B.—*Containing a description of all the bonds, &c.*—Continued.

No.	Names of mortgagors.	Date of mortgage.	Mortgages recorded. In county of—	Book of mortgages.	Page.	Amount of principal unpaid.	Valuation of premises, incl'd'g buildings.	Am't of insurance held by co. on the buildings.	Location (street and number).	Quantity or dimensions of land, and size and description of buildings.
	Wm. Hill	" " "	" " "	"	524	2,000 00	10,000 00	.....	Pt. of Bl'k 24	Bloomfield, Iowa.
	T. M. Fenton	" " "	" " "	"	527	1,000 00	2,500 00	.....	Lots 1 & 2, Bl'k 18	" "
	Jno. M. Johnson	" " "	" " "	"	515	200 00	1,200 00	.....	" 2 Block 10	" "
	J. D. Tribelock	" " "	" " "	"	523	2,000 00	3,500 00	.....	" 2 " 32	" "
	Horace Hamilton	Nov. 8, "	Clayton, Io	3	284	100 00	400 00	.....	" 1, 2, 3, " 10	McGregor, "
	A. J. Jordan	" " "	" "	2	458	200 00	400 00	.....	" 11, 12, " 36	" "
	Oli Nelson	" " "	" "	12	198	200 00	880 00	.....	Sect. 15, R. 3, T. 95	80 acres.
	T. E. Carter	" 16 "	Chickasaw	G.	340	375 00	1,000 00	.....	" 22, " 14, " 96	40 "

(S'g'd)
(S'g'd) C. D. HOOKER, *Secretary.*

H. L. STEWART, *President.*

UPTON, ASSIGNEE, VS. M'LAUGHLIN. 21

72 And thereupon the plaintiff offered in evidence certificate of authority from the auditor of the State of Illinois to the Great Western Insurance Company to do business, which certificate is numbered 3½, to which defendant at the time objected on the grounds of its irrelevancy, immateriality, and incompetency; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The document was then read in evidence to the jury, and was in the words and figures following, to wit:

No. 3½.

AUDITOR'S OFFICE, ILLINOIS,
Bureau of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State, hereby certify that the annexed is a true and correct copy of certificate of authority issued to J. B. Crawford, of Dixon, Illinois, to act as agent of the Great Western Insurance Company, of Chicago, Illinois, as appears from the records of my office.

73 In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, this 6th day of March, A. D. 1873.

[SEAL.] (S'g'd) C. E. LIPPINCOTT,
Aud'r P. A.

STATE OF ILLINOIS,
Auditor's Office, Insurance Department:

SPRINGFIELD, *February 27th*, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that there has been filed in this office a sworn statement showing the condition of the Great Western Insurance Company, located at Chicago, in the State of Illinois, on the 31st day of December, A. D. 1870, in accordance with the provisions of an act of the general assembly of the State of Illinois to incorporate and to govern fire, marine, and inland navigation insurance companies

74 doing business in the State of Illinois, approved March 11th, 1869, and said statement shows that said company is possessed of the requisite amount of capital invested as required by law. Authority is therefore given to the above-named company to transact its appropriate business of fire insurance in this State, in accordance with the laws thereof, until the 31st day of January, A. D. 1872.

I further certify that J. B. Crawford, of Dixon, is hereby authorized as an agent to transact business according to law for said company.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Springfield, the day and year above written.

[AUDITOR'S SEAL.] (S'g'd) C. E. LIPPINCOTT,
Auditor Public Accounts.

And thereupon the plaintiff offered in evidence a certified copy of the rule to show cause and petition in *in* bankruptcy against the

75 Great Western Insurance Company, to which the defendant at the time objected on the grounds that the same was irrelevant, and immaterial, and incompetent. The court overruled the objections, and to the ruling of the court the defendant then and there excepted.

The documents were then read in evidence to the jury, and were in the words and figures following, to wit:

No. 4.

Rule to show cause.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO. } In bankruptcy.

Against whom a petition for an adjudication of bankruptcy has been filed.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Upon filing proofs sustaining the allegations of the petition aforesaid, it is ordered that the said The Great Western Insurance Company, of Chicago, do appear at this court as a court of bankruptcy, to be
76 holden at Chicago, in the county of Cook, in the district aforesaid, on the 27th day of January, 1872, at 11 o'c. a. m., and show cause, if any there be, why the prayer of said petition should not be granted.

And it is further ordered that a copy of said petition, together with a copy of this order, be served on said The Great Western Insurance Company, of Chicago, by delivering the same to it personally, and if personal service cannot be had upon it, then by leaving the same at its last usual place of abode in said district, and by publishing in the Chicago Daily Evening Journal notice of this order at least five days previous to the day herein required for his appearance.

Witness the Hon. Henry W. Blodgett, judge of said court, and the seal thereof, at Chicago, in said district, on the 17th day of January, A. D. 1872.

[SEAL.]

WM. H. BRADLEY,
Clk of Dist. Court for said Dist.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

77 I served a true and complete copy of the foregoing order, and also of the paper-writing hereto attached, including the certificate of William H. Bradley, esq., clerk of the district court of the United States, thereto appended, upon the Great Western Insurance Company, of Chicago, therein named, by delivering the same to R. G. Waters, the vice-president of said company, on the 17th day of January, A. D. 1872, the president thereof being absent from said district.

B. H. CAMPBELL,
U. S. Marshall,
By S. H. TOURTELOTTE,
Deputy.

To the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois:

The petition of Richard M. Hooley, of the city of Chicago, in the county of Cook and State of Illinois, respectfully shows:

That he is a creditor of the Great Western Insurance Company,
78 of Chicago, a corporation created by and existing under the laws

of the State of Illinois, and located and having its principal office for doing business at Chicago, in said State, who, for a period of six months next preceding the date of the filing of the petition, has resided at Chicago, in the county of Cook and State of Illinois, in the district aforesaid.

That your petitioners demand, provable against the said debtor, in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that your petitioners believe that said debtor owes debts to an amount exceeding the sum of three hundred dollars; that your petitioners' demand exceeds the amount of two hundred and fifty dollars, and that its nature is as follows: A demand and debt for the sum of forty-five hundred dollars for losses suffered by your petitioner in the fire of Oct. 9th, 1871, being upon the policies issued by said company to your petitioner, dated respectively Jan.
19th, 1871, and August 6th, 1871, the first of said policies being
79 numbered 51695, and running from January 5th, 1871, to January 5th, 1872, at noon, and insuring your petitioner against loss or damage by fire to the amount of twenty-four hundred dollars on improvements contained in Hooley's Opera House, consisting of stage scenery, proscenium, gas and water pipes and fixtures, seats, chandeliers, furniture and fixtures, fresco painting and ornaments, all contained in Hooley's Opera House, known as No. 89 South Clark street, Chicago, Illinois; the second of said policies being numbered 20637, and running from August 6th, 1871, to August 6th, 1872, at noon, and insuring your petitioner against loss or damage by fire to the amount of two thousand dollars on his four-story and basement brick building situate on the east side of, and known as, No. 87 South Clark street, Chicago, Illinois.

That on or about the first day of November, 1871, due proofs of loss, as required by said policies, were made by your petitioner to said company, and on the 14th day of November, 1871, said proofs of
80 loss were duly accepted and adjusted by said company, and said sums became due and payable by the terms of said policies in sixty days thereafter, to wit, on the 14th day of January, 1872.

And your petitioner further represents that within the six calender months next preceeding the date of this petition, the said The Great Western Insurance Company of Chicago, at the district aforesaid, did commit an act of bankruptcy within the meaning of said act, to wit:

In that it did heretofore, to wit, on the 15th day of December, A. D. 1871, being insolvent, make to Charles Kern, of Chicago, in the county of Cook and State of Illinois, a payment of money, to wit, four hundred dollars, with interest, to give preference to said Charles Kern, who was then and there a creditor of said The Great Western Insurance Company of Chicago, and with the intent to defeat and delay the operation of said act.

Your petitioner further shows that said The Great Western Insurance Company of Chicago is admitted by its officers and agents to be
81 now, and to have been for some time, insolvent and unable to pay its liabilities as they accrue, but that its officers are striving to continue the existence in business by said company by delaying payments to creditors until they can receive money from premiums and assessments; that as fast as sufficient funds are received from premiums and assessments, they are paying claims due, sometimes in full and sometimes on a percentage; that they have settled with many others besides said Kern, whose names are unknown to your petitioner; that it is

apparent that if such a state of things continue to exist some of the creditors will receive eventually little or nothing, while others will be paid nearly or quite in full; that such a state of things is calculated to greatly defeat the operation of the bankrupt act; that the money received and to be received from such premiums and assessments are wholly inadequate to pay the whole or any considerable portion of the debts of said company.

Wherefore your petitioner prays that the said The Great Western Insurance Company of Chicago may be declared a bankrupt, and
82 that a warrant may be issued to take possession of its estate; that the same may be distributed according to law; that the usual injunction be issued in restraint of said debtor, as provided by the fortieth section of said act, and a warrant to the marshal to forthwith take possession provisionally of all the property and effects of the said debtor and safely keep the same until the further order of the court, and that such further proceedings may be had thereon as the law in such cases prescribes.

Dated January 17th, 1872.

RICHARD M. HOOLEY,
Petitioner.

By S. M. MILLARD.

BENTLEY, BENNETT, ULLMAN & IVES, & S. M. MILLARD,
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, S. M. Millard, agent and attorney, one of the petitioners above named, do hereby make solemn oath that the statements con-
83 tained in the foregoing petition, subscribed by me on behalf of Richard M. Hooley, are true so far as the same are stated of my own knowledge, and that those matters that are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

S. M. MILLARD.

Subscribed and sworn to before me this 17th day of January, A. D. 1872.

E. A. DRUMMOND,
U. S. Com'r N. D. Ill's.

(Endorsed:) Filed Jan. 17th, A. D. 1872; at 10½ o'c. a. m. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the petition in the matter of the Great Western Insurance Company of Chicago, in bankruptcy, as appears from the original, remaining now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 17th day of January, A. D. 1872.

84 WM. H. BRADLEY, *Clerk.*

[U. S. int. rev. stamp, cancelled.]

(Endorsed:) Filed Jan. 18th, 1872. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true copy of the rule to show cause, with marshal's return and copy of petition attached, in the matter of the Great Western Insurance Compny of Chicago, in bankruptcy, as appears from the original now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

85 In the district court of the United States for the northern district of Illinois.

THURSDAY, *April 11th, A. D.* 1872.

Present, Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY OF CHICAGO, BANKRUPT. } In bankruptcy.

It appearing to the court, from the certificate of H. N. Hibbard, esq., the register to whom said matter was referred, that the creditors attending the creditors' meeting herein, on the 8th day of April, A. D. 1872, before said register failed to elect an assignee of said bankrupt's estate, and said register having certified said matter to this court for its action in the premises, it is ordered that C. W. Upton of Chicago be, and he is hereby, appointed assignee of the estate of said bankrupt, and vested with all the rights and powers of assignees in similar cases.

NORTHERN DISTRICT OF ILLINOIS: *ss:*

I, William H. Bradley, clerk of the district court of the United
86 States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order entered of record in said court on the eleventh day of April, A. D. 1872, in the matter of the Great Western Insurance Company of Chicago, in bankruptcy, as appears from the records now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this twenty-second day of April, A. D. 1876.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificates are in due form of law, and that said signatures purporting to be his are his genuine signatures.

87 Witness my hand at Chicago this 22nd day of April, A. D. 1876.

H. W. BLODGETT,
Dist. Judge, Nor. Dist. of Ills.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, district judge of the United States for said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and ought of right to be given to all his official acts.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

88 Thereupon the plaintiff offered in evidence a copy of the order of adjudication in bankruptcy, to which the defendant at the time objected, on the grounds of irrelevancy, immateriality, and incompetency; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The document was then read in evidence to the jury, and was in the words and figures following, to wit:

No. 5.

In the district court of the United States for the northern district of Illinois.

TUESDAY, *February 6th*, A. D. 1872.

Present, the Hon. Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

This cause coming on this day to be heard, now comes the petitioner, Richard M. Hooley, by Bentley, Bennett, Ullman and Ives, and
89 S. M. Millard, his attorneys, and the said The Great Western Insurance Company failing to appear in answer to the order to show cause on creditors' petition heretofore entered herein, and it being now three times solemnly called, comes not but makes default: It is therefore considered by the court that its default be entered; and thereupon and upon consideration of the proofs in said cause it was found that the facts set forth in said petition were true, and it is therefore adjudged that the said The Great Western Insurance Company, of Chicago, became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, before the filing of the said petition, and it is therefore declared and adjudged bankrupt accordingly; and it is further ordered that the said bankrupt shall, within five days after the service of a copy of this order upon it, make and deliver or transmit by mail, post-paid, to the marshal, as messenger, a schedule of its creditors and inventory of its estate in the form and verified
90 in the manner required of the petitioning debtor by the said act.

And it is further ordered that a warrant of seizure issue

herein, returnable before H. N. Hibbard, esq., one of the registers in bankruptcy of this court, to whom this matter is hereby referred, on the 6th day of March, A. D. 1872, at 11 o'c. a. m.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I William H. Bradley, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be a true and correct copy of the order of adjudication entered of record in said court on the 6th day of February, A. D. 1873, in the matter of the Great Western Insurance Company, of Chicago, in bankruptcy, as appears from the records now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL.] (S'g'd) WM. H. BRADLEY, *Clerk.*

91 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificate is in due form of law, and the said signature purporting to be his is his genuine signature.

Witness my hand at Chicago this 22nd day of April, A. D. 1876.

(S'g'd) H. W. BLODGETT,
Dist. Judge Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the
92 same, and is now, district judge of the United States for the said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are, and of right ought to be, given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

{SEAL OF THE COURT.} (S'g'd) WM. N. BRADLEY, *Clerk.*

Thereupon the plaintiff offered in evidence a copy of the notification of appointment of assignee and his acceptance, to which the defendant at the time objected, because the same was immaterial, irrelevant, and incompetent; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The document was then read in evidence to the jury as evidence, and was in the words and figures following, to wit:

93 No. 6.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

To Clark W. Upton, esq., of Chicago, in the county of Cook, and State of Illinois:

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupt on the eleventh day of April, A. D. 1873, by the court, by special order entered of record this day, and further that you are hereby required forthwith to notify the undersigned, a register in bankruptcy of the district aforesaid, of your acceptance or rejection of the said trust.

Dated at Chicago the 11th day of April, 1873.

(S'g'd) H. N. HIBBARD,
Register in Bankruptcy.

94 To whom it may concern:

Be it known that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt this 11th day of April, A. D. 1873.

(S'g'd) C. W. UPTON, *Assignee.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the notice of appointment to Clark W. Upton, assignee of the Great Western Insurance Company, of Chicago, in bankruptcy, as appears from the original now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL OF COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

95 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificates are in due form of law, and that the said signature purporting to be his is his genuine signature.

Witness my hand, at Chicago, this 22nd day of April, A. D. 1876.

(Signed) H. N. BLODGETT,
Dist. Judge Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of the Hon. Henry W. Blodgett,

whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, district judge of the United States for said
96 northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL OF COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

Thereupon the plaintiff offered in evidence a copy of the deed of assignment, to which the defendant at the time objected that the same was incompetent and irrelevant; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The document was then read in evidence to the jury, and was in the words and figures following, to wit:

No. 7.

Assignment of bankrupt's effects.

In the district court of the United States for the northern district of Illinois.

97 IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents that Clark W. Upton, of Chicago, in the county of Cook and State of Illinois, in said district, has been duly appointed assignee in said matter:

Now, therefore, I, Homer N. Hibbard, one of the registers of said court in bankruptcy, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, do hereby convey and assign to the said Clark W. Upton, assignee as aforesaid, all the estate, real and personal, of the said The Great Western Insurance Company of Chicago, bankrupt, aforesaid, including all the property of whatever kind of which it is possessed or in which it was interested or entitled to have on the sixth day of February, A. D. 1872, with all its deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this
98 assignment by the provisions of said 14th section of said act; to have and to hold all of the foregoing premises to the said Clark W. Upton and his heirs forever. In trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations, set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this eleventh day of April, A. D. 1873.

[SEAL OF THE COURT.] H. N. HIBBARD,
Register in Bankruptcy.

NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the deed of assignment to Clark W. Upton, assignee of the Great Western Insurance Company, of Chicago, in bankruptcy, as appears from the original now in my custody.

In testimony whereof I have hereunto set my hand and affixed
99 the seal of said court at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificate is in due form of law, and that the said signature purporting to be his is his genuine signature.

Witness my hand, at Chicago, this 22nd day of April, 1876.

(S'g'd) H. W. BLODGETT,
Dist. Judge Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that
100 I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, district judge of the United States for said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, 1876.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

Thereupon the plaintiff offered in evidence a copy of the call made upon stockholders, to which the defendant, at the time, objected, on the ground that the same was irrelevant, immaterial, and incompetent; which objections the court overruled, and to which ruling of the court the defendant then and there excepted.

The document was then read to the jury in evidence, and was
101 in the words and figures following, to wit:

No. 8.

In the district court of the United States for the northern district of Ill's.

FRIDAY, *July* 5th, A. D. 1873.

Present, the Hon. Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate

of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will require to be paid in order to meet the demands now due from and proven against the estate of said bankrupt; and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of said bankrupt be paid to said assignee on or before the 15th
102 day of August, A. D. 1872, at his office, in Chicago, Illinois, and in default thereof, that the said assignee proceed to collect the same. It is further ordered that the notice of thisbe given to the stockholders of the said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify that I have carefully compared the above and foregoing with the original order of adjudication of said court entered of record on the 6th day of March, A. D. 1872, the notification of appointment of assignee, the deed of assignment of bankrupt's effects, and the order of said court entered of record on the 5th day of July, A. D. 1872, as appears from the respective originals now in my custody, in said matter of the Great Western Insurance Company, of Chicago, and that the same are true and correct copies of said originals, and the whole thereof.

In testimony whereof I have hereunto set my hand and affixed
103 the seal of said district court, Chicago, in said district, this 20th day of October, A. D. 1873.

[SEAL OF THE COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that William H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificate is in due form of law and the said signature purporting to be his is his genuine signature.

Witness my hand, at Chicago, this 20th day of October, A. D. 1873.

(S'g'd) H. W. BLODGETT,
U. S. Dist. Judge Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose
104 name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same and is now district judge of the United States for said northern district of Illinois, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 20th day of October, A. D. 1873.

[SEAL OF COURT.] (S'g'd) WM. H. BRADLEY, *Clerk.*

Thereupon the plaintiff offered in evidence a copy of the call upon stockholders by assignee and certificate of its publication, to which the defendant at the time objected on the grounds of immateriality, incompetency and irrelevancy; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The document was then read in evidence to the jury, and was
105 in the words and figures following, to wit:

No. 9.

OFFICE OF THE ASSIGNEE OF THE
GREAT WESTERN INSURANCE COMPANY,
163 *East Washington st., Chicago, July* 8, 1872.

To

You are hereby notified that on petition filed and proofs heard in the matter of the Great Western Insurance Company, a bankrupt, in the district court of the United States for the northern district of Illinois, the following order was made and entered of record in said court on the 5th day of July, 1872, viz:

IN THE MATTER OF THE
GREAT WESTERN INSURANCE COMPANY, } In bankruptcy.
BANKRUPT.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be re-
106 quired to be paid in order to meet the demands now due from and proven against the estate of said bankrupt; and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

The holders of the unpaid capital stock in said bankrupt corporation will please take notice and govern themselves accordingly. Under the order of said court and the action of the officers of said company prior to bankruptcy per cent. of the stock held by you now standing on the books of said bankrupt is long past due. The balance, by the order of said court, will become due August 15th, 1872. By a prompt re-
107 mittance of the amount now due costs will be avoided.

Respectfully,

C. W. UPTON, *Assignee.*

The following certificate attached to a printed notice of the foregoing call upon stockholders was then offered in evidence by the plaintiff. The defendant objected to the said printed copy and certificate of publication as incompetent and immaterial; which objections were overruled by the court, and to which ruling the defendant then and there excepted. The notice and certificate were then read to the jury:

Certificate.

Printed notice of the call same as it appears in document No. 6 was here attached, to the left-hand corner of certificate.

This certifies that a notice, of which the annexed printed slip is a true copy, was published one successive day, to wit, one times in the Tuesday edition of the Inter-Ocean, a newspaper published and printed in the city of Chicago, of general circulation throughout Cook County and the State of Illinois; that the date of the first paper containing the same was the 9th day of July, A. D. 1872, and that we have received two $\frac{05}{100}$
108 dollars for publishing the same. Dated at Chicago this 3d day of October, 1872.

C. D. ALLEN, *Publisher.*

The plaintiff, to further maintain the issues upon his part, then called J. H. Philo as a witness, who, being first duly sworn, testified as follows: I reside in Chicago, State of Illinois. Have resided there for eight years. (Witness here was handed book purporting to be Gross' Statutes of Illinois.) This book which I have in my hand is Gross' Statutes of Illinois. It is admitted in the courts of that State as containing the laws of Illinois up to 1874.

Am at present in the employ of C. W. Upton. Am not a lawyer by profession. Have seen it used in a great number of cases in the United States circuit and district courts of Chicago. C.W. Upton, the assignee, had a great many cases in those courts. As to the insurance law I have examined it a great many times. Have never seen this work used in the courts outside of Cook County. Don't know how many counties there are in the State outside of Cook County.

109 Plaintiff here offered in evidence Gross' Statutes of Illinois, and read in evidence sections 16, 19, 20, of an act of the legislative assembly of Illinois purporting to be an act entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," and also section 1 of an act "regulating the rate of interest."

Defendant objected on the grounds that evidence offered was irrelevant and immaterial, and that Gross' Statutes of Illinois offered were incompetent evidence; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

It was then agreed in open court that the plaintiff should be entitled to use the whole of said statutes, but the formal reading of all the statutes was waived subject to the defendant's previous objection to the statutes as evidence.

The sections were then read, and were in the words and figures following, to wit:

"§ 16. The trustees and corporators of any company organized under this act shall be severally liable for all debts or responsibilities
110 of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded as hereinbefore provided. Notes taken in advance of premiums under this act are not to be considered debts of the company in determining whether a company is insolvent, but are to be regarded as assets of the company.

* * * * * * *

"S. 19. All insurance companies heretofore organized in the State of Illinois and now doing business in this State are hereby brought under the provisions of this act, except that their capital may continue of the amounts and character named in and authorized by their respect-

ive charters during the existing terms of such charters; and the investments of the capital and assets of such companies may remain the same as prescribed by their charters; anything in this act to the contrary notwithstanding; and such companies shall also be entitled to all the privileges and powers granted by said charters.

* * * * * * *

"S. 20. All companies incorporated or extended under this
111 act shall be deemed and taken to be bodies corporate and politic in fact and in name; and shall be subject to all the provisions of law in relation to corporations so far as the same are applicable."

* * * * * * *

"1. ON LOAN OR FORBEARANCE OF MONEY.—That the rate of interest upon the loan or forbearance of any money, goods, or thing in action shall continue to be $6 upon $100 for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided."

112 Page 84,

Cheyenne, Wyoming,

No.	Names.	Shares.	1st installment. Am't stock.		2nd installment.		3rd
1877	J. D. Woolley	25	2,500 00	Feb'y 6th, 1871	125 00		
1878	T. A. Kent	10	1,000 00	" " "	50 00	May 6th, 1871	50 00
1879	Curtis & Arnold	10	1,000 00	" " "	50 00		
1880	D. McLaughlin	10	1,000 00	" " "	50 00	May 6, 1871	50 00
1881	Geo. D. Fogleson & Co	10	1,000 00	" " "	50 00	" " "	50 00
1882	Thomas Duncan	25	2,500 00	" " "	125 00	" " "	125 00
1883	C. H. Warrens	10	1,000 00	" " "	50 00	" " "	50 00
1886	Harper Housman	20	2,000 00	" " "	100 00	" " "	100 00
1887	Dan'l Curran	10	1,000 00	" " "	50 00		
1888	N. W. Hibbard	10	1,000 00	" 7, "	50 00	May 6, 1871	50 00
1889	Geo. F. Price	10	1,000 00	" " "	50 00	" " "	50 00
1891	O. M. Rockafeller	10	1,000 00	" " "	50 00	" " "	50 00
1892	Tim. Dyer	10	1,000 00	" " "	50 00	" " "	50 00
1900	W. B. Hugus	25	2,500 00	" 23, "	125 00	" 23, "	125 00
1130	E. W. Crittenden	10	1,000 00	" " "	50 00	" " "	50 00
1890	Joslin & Park	10	1,000 00	" " "	50 00	" " "	50 00
1909	Stimpson & Barnard	10	1,000 00	March 6, "	50 00	June 6, "	50 00
1910	L. L. Tesson	10	1,000 00	" 8, "	50 00	" 8, "	50 00
1911	Sam'l S. Summer	20	2,000 00	" " "	100 00		
1912	James Volentine	5	500 00	" " "	25 00	June 8, 1871	25 00
1913	Geo. D. Williamson	5	500 00	" " "	25 00	" " "	25 00
1914	E. H. Heller	5	500 00	" " "	25 00	" " "	25 00
1915	Thomas Duncan	10	1,000 00	Ap'l 4, "	50 00	July 4, "	50 00
1920	W. B. Royal	20	2,000 00	" " "	100 00	" " "	100 00
1921	J. D. Woolley	25	2,500 00		125 00		
1922	Geo. F. Price	10	1,000 00	Ap'l 4, 1871	50 00	July 4, 1871	50 00
1923	E. H. Heller	5	500 00	" " "	25 00	" " "	25 00
1924	E. P. Snow	5	500 00	" " "	25 00		
1926	Church & Bristol	5	500 00	" 8, "	25 00		
1927	C. M. Rockafeller	10	1,000 00	" " "	50 00		
1928	J. A. Campbell	5	500 00	" 10, "	25 00	July 10, 1871	25 00
1929	Church Howe	5	500 00	" 5, "	25 00	" 5, "	25 00
1930	W. R. Steele	10	1,000 00	" 10, "	50 00	" 10, "	50 00
1931	N. A. Baker	10	1,000 00	" 11, "	50 00		
1932	J. W. Mason	20	2,000 00	" " "	100 00		
9030	J. H. Frantz	10	1,000 00	May 10, "	50 00	Aug. 10, 1871	50 00
9023	C. A. Reynolds	10	1,000 00	" " "	50 00	" " "	50 00
9038	Orin P. Stokes	5	500 00	June 3, "	25 00	Sep. 3, "	25 00
1174	M. C. Foot	10	1,000 00	" 16, "	50 00	" 16, "	50 00
	J. H. Frantz	5	500 00	" 29, "	25 00	" 29, "	25 00
9492	G. D. Thayer	10	1,000 00	Feb'y 23, "	50 00	May 23, "	50 00
9433	T. A. Kent	10	1,000 00	Jan. 22, 1872	50 00	Jan. 22, 1872	50 00

stock-ledger.

stock-statement.

installment.	4th installment.			Assignment.		Paid.	Unpaid.	Transfer.
						125 00	375 00	
Aug. 6th, 1871	50 00	Dec. 4, 1871	50 00	Dec. 4, 1871	200 00	200 00	800 00	
						50 00	950 00	
Aug. 6th, 1871	50 00	Nov. 6, 1871	50 00			200 00	800 00	
" " "	50 00					150 00	850 00	
" " "	125 00					375 00	2, 125 00	
" " "	50 00					150 00	850 00	
						200 00	1, 800 00	
						50 00	950 00	
						100 00	900 00	
Aug. 6, 1871	50 00					150 00	850 00	
						100 00	900 00	
Aug. 6, 1871	50 00	Dec. 4, 1871	50 00	Dec. 4, 1871	200 00	200 00	800 00	
" 23, "	125 00					375 00	2, 125 00	
" " "	50 00	Dec. 16, 1871	50 00			200 00	800 00	G. D. Thayer, Dec. 14, 1871, $2,422.
" " "	50 00	" 15, "	50 00	Dec. 15, 1871	200 00	200 00	800 00	T. A. Kent, Jan. 22, 1872, $2,432.
Sept. " "	50 00	Jan. 2, 1872	50 00	Jan. 2, 1872	200 00 Note.	200 00	800 00	Remarks.
" 8, "	50 00	Sep. 8, 1871	50 00	Dec. 15, "	200 00	200 00	800 00	4 notes 50$, Jan., Ap'l, June, June.
						100 00	1, 900 00	
Sept. 8, 1871	25 00	Sep. 8, 1871	25 00			100 00	400 00	
" " "	25 00					75 00	425 00	
" " "	25 00	Sep. 8, 1871	25 00	Dec. 15, 1871	100 00	100 00	400 00	
						100 00	900 00	
Sept. 8, 1871	100 00					300 00	1, 700 00	
							2, 500 00	
Oct. 4, 1871	50 00					150 00	850 00	
						50 00	450 00	
						25 00	475 00	
						25 00	475 00	
							1, 000 00	
						50 00	450 00	
						50 00	450 00	
						100 00	900 00	
							1, 000 00	
						100 00	1, 900 00	
						100 00	900 00	
						100 00	900 00	
						50 00	450 00	
						100 00	900 00	
						50 00	450 00	
Aug. 23, 1871	50 00	Dec. 16, 1871	50 00			200 00	800 00	
Jan. 22, 1872	50 00	Jan. 22, 1872	50 00	Jan. 22, 1872	200 00	200 00	800 00	

113 And thereupon and thereafter the said plaintiff, to further maintain the issue upon his part, produced as a witness one PETER G. GARDNER, who, being first duly sworn, testified as follows, to wit:

My name is Peter G. Gardner; I reside in Chicago, Cook County, State of Illinois; have resided there for seven or eight years last past. Am acquainted with Great Western Insurance Company. It' principal office was in Chicago, Illinois; was its book-keeper from May, '71, to February, '72; am not personally acquainted with Daniel McLaughlin, the defendant, but know him.

The original stock-books of the G. W. Ins. Co. were destroyed by fire on the 8th and 9th of October, '71; I mean the great Chicago fire. I have seen these stock-books. McLaughlin's name was on the stock-books as a stockholder at Cheyenne. My recollection is that ten shares of stock stood in his name on the stock-books; don't remember what the books showed had been paid upon his stock.

There was a branch at Cheyenne, as shown by the stock-books.

114 They did not show its officers. There were original records which showed who were the officers of the branch. As shown by these records, McLaughlin was the president of the branch at Cheyenne. (Here witness was shown a book purporting to be a stock-book.) This is the stock-ledger of the Great Western Insurance Company.

Here the plaintiff offered in evidence the above-mentioned stock-ledger, to the introduction of which the defendant at the time objected, on the grounds that the book offered was immaterial, irrelevant, and incompetent; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The plaintiff then exhibited page 84 of said stock-ledger to the jury, which contained the entry of stock in name of D. McLaughlin, and was in the words and figures following, to wit (see copy attached): No. 1880. Name of D. McLaughlin. No. shares, 10; amount of stock, $1,000.

Paid 1st instalment		$50	00
Feb. 6, 1871, 2d	do	$50	
May 6, 1871, 3	do	50	
Aug. 6, 1871, 4	d	50	
Nov. 6, 1871, X			

115 Here the defendant, D. MCLAUGHLIN, was called as a witness by the plaintiff, and, being first duly sworn, testified as follows:

I have in my possession the bond numbered 1880, signed by me in February, 1871, at Cheyenne, Wyoming, and given to the Great Western Insurance Company, and afterwards surrendered to me through Mr. Kent, its agent and manager. (Here witness, at plaintiff's request, produced the bond mentioned.) I have also in my possession the certificate of stock No. 1880, for ten shares delivered to me in February, 1871, by Thos. W. J. Long, special agent of the Great Western Insurance Company at Cheyenne, when I signed that bond and paid the first fifty dollars upon it.

Here plaintiff offered the bond and certificate above mentioned in evidence, which were in the words and figures following, to wit:

Bond.

No. 1880.

Know all men by these presents that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company

of Chicago, Illinois, received by me, I am held and firmly bound
116 and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars, in instalments, as follows: Twenty-five per cent. thereof on receipt of stock-certificate; twenty-five per cent. in three months from date hereof; twenty-five per cent. in six months from date hereof; twenty-five per cent. nine months from date, with interest ten per cent. after due.

Cheyenne, February 6th, 1871.

DANIEL McLAUGHLIN.

(Endorsed on the back as follows:) No. 1880; am't, $200.00.

Received this 14th day of February, 1871, fifty dollars, being first instalment five per cent. on the within bond.

THOS. W. J. LONG,
Sp. Ag't G. W. Ins. Co.

$50.]

Received this 19th day of August, 1871, fifty dollars, being 2nd instalment of five per cent. on the within bond.

C. D. HOOKER,
M.

$50.]

117 Received this 19th day of August, 1871, fifty dollars, being 3d instalment of five per cent. on the within bond.

C. D. HOOKER, *Sec.*,
M.

$50.]

Received on this 19th day of August, 1871, fifty dollars, being the fourth instalment of five per cent. on the within bond.

C. D. HOOKER, *Sec.*,
M.

Certificate of stock.

No. 1880.] [Shares, 10.

(Written across the face in red ink:) Revenue stamp, 25 cents. Non-assessable.

This is to certify that D. W. McLaughlin is entitled to ten shares in the capital stock of the Great Western Insurance Company of Chicago, Ills., of one hundred dollars each, of which twenty per cent. is payable as follows: Five per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine months from date, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate, being subject to the charter and by-
118 laws of said corporation, and laws of the State of Illinois.

Dated at Chicago, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-one.

H. L. STEWART,
President.

C. D. HOOKER, *Secretary.*

Here the witness McLaughlin was cross-examined, and asked the following question by defendant's counsel:

Question. State under what circumstances you signed the bond No. 1880, which has just been offered in evidence.

The plaintiff objected to the question on the grounds that it was immaterial and irrelevant. The objection was sustained, and to the ruling of the court in sustaining the objection the defendant then and there excepted.

Here the direct examination of the witness Gardner was resumed. Witness was shown circular.

Have seen this kind of circular before? They were issued in July, 1872, by the assignee and mailed to all the stockholders.

The last three entries of payments upon McLaughlin's bond
119 are in the same handwriting, and are in the same handwriting as the entries referred to on page 84 of the stock-ledger. They are all in the handwriting of Mr. Morris, who was a clerk in the office.

The original books were burned up. I know this because I was as near as I could get to the building at the time of the fire. Think there was no one in the office at the time of the fire. The books in general use were not put into the vault, and the stock-ledger was one of these. In the vault were old papers and letters belonging to the G. W. Ins. Co., and these were not destroyed by the fire. I have no connection with the bankrupt insurance co. since September, 1873. Have no connection with the plaintiff.

"The man Morris, who made the stock-book here presented, was known as the stock-clerk. His duties were to look after matters pertaining to stock. This book was made by him under my supervision. He made all the entries on this page of the stock-ledger. The entries of the time of payments upon defendant's stock in this book does not correspond with the entries upon the back of the bond;
120 that is, the three last payments do not. Mr. McLaughlin sent in a bill for services, which was applied in payment of his stock, and the three last payments were all entered on the bond at the same time, but made to appear as three payments.

The notice of the assessment or call upon the stockholders was published in the Inter Ocean newspaper in Chicago. I took the notice to the office and saw it after it was published in perhaps half-dozen numbers of the papers. It was published in one issue I know. I sent a copy of it to each stockholder. I mailed a copy of this notice to D. McLaughlin the 15th day of July, 1872. In the two blank lines I wrote D. McLaughlin, Cheyenne, Wyo. Ter.; directed envelope to correspond; stamped it and mailed it to him.

Here the notice was offered in evidence by the plaintiff, and to its introduction the defendant excepted on the grounds that the notice was irrelevant and immaterial, and also was not competent; which objections were overruled by the court, and to which ruling the defendant then and there excepted.

The notice was in the words and figures following, to wit:

121 OFFICE OF THE ASSIGNEE OF THE
GREAT WESTERN INSURANCE COMPANY,
163 *Washington St., Chicago, July 8th*, 1872.

To

You are hereby notified that on petition filed and proofs heard in the matter of the Great Western Insurance Company, a bankrupt, in the

district court of the United States for the northern district of Illinois, the following order was made and entered of record in said court on the fifth day of July, 1872, viz:

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt; and upon investigation of the
122 facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

The holders of unpaid capital stock in said bankrupt corporation will please take notice and govern themselves accordingly.

Under the order of said court, and the action of the officers of said company prior to bankruptcy, per cent. of the stock held by you, now standing on the books of said bankrupt, is long past due. The balance, by the order of said court, will become due August 15, 1872. By a prompt remittance of the amount now due costs will be avoided.

Respectfully,

C. W. UPTON, *Assignee.*

123 I carried this notice to the office myself. I am positive I mailed a similar notice to D. McLaughlin, because I did not omit any one. I also recollect this, because he was president of the branch at Cheyenne. I took the names from the stock-book of the company—the one made by Morris now here in court. I have been a witness for the plaintiff in several similar suits to this against stockholders."

The plaintiff, to further maintain the issued on his part, called as a witness J. K. PHILO, who, being first duly sworn, testified as follows, to wit:

I reside in Chicago, Cook County, State of Illinois. Have resided there eight years. Knew Great Western Insurance Company; was connected with it as clerk. Have seen the stock-book of the G. W. Ins. Co. It was destroyed by the fire in 1871. Know the stock-book here in court, and have examined it; it is the stock-ledger of the Great Western Insurance Company. Don't know that McLaughlin's name was on the original book destroyed by the fire.

Here plaintiff rested.

124 And thereupon and thereafter the defendant, to maintain the issues upon his part, called PETER G. GARDNER, who had already been duly sworn as a witness in this case, who, in answer to questions, testified substantially as follows:

C. D. Hooker was secretary of the Great Western Insurance Co. in

1871. I know his handwriting. I was clerk in the company's office, and often saw it. (Here witness was shown letter.) I know this handwriting; it is that of Mr. Morris, the stock-clerk, who also acted as clerk for Mr. Hooker, the secretary.

The letter was here offered in evidence and read to the jury, and is in the words and figures following, to wit:

CHICAGO, 8, 19*th*, 1871.

T. A. KENT, Esq.,
Cheyenne, W. T.:

DEAR SIR: Herewith we hand you bond of Mr. McLaughlin, which you will please return to him. Also pay him $50.00, taking a receipt of him for $200, the amount of his bill, and report same in your next month' report, sending his receipt as your voucher.

Resp'ly, yours,

125 C. D. HOOKER, *Sec.*,
M.

DANIEL MCLAUGHLIN was next called as a witness on behalf of the defendant, and, having already been duly sworn as a witness in this case, was shown the bond No. 1880 offered in evidence by the plaintiff, and he then testified as follows:

I signed this bond at Cheyenne, Wyoming Territory, on or about the 14th day of February, 1871. Colonel Long, the special agent of the Great Western Insurance Company, had to wait on me a few days for the first instalment. I got the $50 about the 14th; paid it to him in my office, and signed the bond. Some time afterwards he handed me the certificate of stock which according to the terms of the bond I was to receive. This contract set out in this bond is the only one I ever made with the Great Western Insurance Company, or with any one else, for the shares of stock in the certificate.

The following question was then asked of the witness:

Ques. State all the facts and circumstances connected with the
126 signing of this bond by you (No. 1880) and its delivery to the Great Western Insurance Company. What statements and representations were made to you by said company, if any, relating to the subject-matter of said bond?

The plaintiff objected to the question on the ground of immateriality and irrelevancy. It was then agreed between the parties that the defendant should make an offer in writing of what was expected to be proved by the witness, which the witness would testify to in answer to the question; and that the same should be submitted to the court.

The following offer was then submitted in writing to the court:

The defendant offers to prove by himself as a witness that the Great Western Insurance Company, by and through its special and only authorized agent, Thos. W. J. Long, at and before the signing of said bond in the month of February, 1871, represented and stated to the defendant that if he would take ten shares of the stock in the said Great Western Insurance Company, he could have them for the sum of two hundred dollars, payable in four instalments of fifty dol-
127 lars each, fifty dollars down, and the remaining one hundred and fifty dollars in three, six, and nine months thereafter; that said shares of stock would be non-assessable, and that the defendant would not incur any liability by reason of taking said ten shares of stock, except to pay the Great Western Insurance Company therefor the

said sum of two hundred dollars. That the defendant did agree upon these terms, and upon no other, to take ten shares of said stock in said Great Western Insurance Company; that all the terms and conditions of said agreement were embodied in a printed form (No. 1880), the blanks of which were filled out in writing, and was signed by this defendant, and delivered to said Long as the bond and agreement of this defendant with the Great Western Insurance Co., and the stock-certificate (No. 1880) was thereafter delivered by said Long to this defendant in pursuance of said bond and as the consideration therefor; that said certificate of stock was not received by defendant upon any other agreement, contract, offer, proposition, or subscription than
128 herein stated, and reduced to embraced in the terms of the said bond; that the defendant believed the statements and representations of said Long as to the limit of his liability, and acted upon that belief, and that he now knows that said statements were false.

Thereupon the court sustained plaintiff's objection to the question; to which ruling of the court the defendant then and there excepted.

The following question was then propounded to the witness on his direct examination:

Ques. State what, if anything, occurred between you and the Great Western Insurance Company after the return to you of your bond, and prior to the bankruptcy of the company, relative to its attempt to levy an assessment upon your ten shares of stock.

Plaintiff objected to the question on the grounds that the same was irrelevant and immaterial. It was then agreed between the parties that the defendant should make an offer in writing of what was expected to be proved by the witness in answer to the question, and which the witness would testify to, which offer should be submitted to the court.

The following offer was then submitted in writing to the court:
129 Defendant offers to prove by defendant as a witness that some time after the great fire in Chicago, the exact date of which he cannot now state, he received through the mail one or more printed notices of some action on the part of persons in Chicago supposed to be connected with the Great Western Insurance Co., which pretended to be a levy of 20% upon the par value of each share of stock, to meet the losses occasioned by the fire, and that he disregarded the same; that meeting T. A. Kent, agent of the co. in Cheyenne, soon thereafter, the latter told him he had sent him one of these notices. That he then informed this agent that he did not propose to pay this assessment, and was answered that Col. Long, the special agent of the company, would be here in Cheyenne in a few days. That in a few days thereafter Long arrived here, came to defendant's office, represented that the company's losses by the fire in Chicago would not exceed $225,000, that the payment of these losses would exhaust the available assetts of the company, and leave it without funds to carry on its business, and
130 therefore it was deemed best by those having the management of its affairs in Chicago to make this additional call upon the holders of stock in the company, so that it could promptly pay up all of its losses and go on with its business with its capital unimpaired; that this would be a great advertisement for the company, and make it one of the best in the country; and that he would not take sixty cents on the dollar for the stock he then owned. That thereupon defendant called his attention to the contract that he had made and complied with; and that Long then stated that no assessment could be enforced

here, and that the payment of the assessment, if made, would be wholly voluntary. He urged upon defendant the policy of paying this assessment and urging upon the other stockholders in Cheyenne to promptly pay this assessment; that the defendant then stated to Agent Long that he did not consider himself bound to pay any more on the stock than he had agreed to pay, and did pay; and that he did not feel like making any voluntary payments to the company; and he offered to return the stock to the company, or transfer it to Long, for the two
131 hundred dollars which he has paid.

Thereupon the court sustained the plaintiff's objections to the question; to which ruling of the court defendant then and there excepted.

The witness resumed:

At the time I made the contract and received the stock I did not know the provisions of the statute laws of the State of Illinois relating to insurance companies, or any other subject; nor until the present term of this court, when for the first time they were brought to my notice and knowledge by the plaintiff offering them in evidence in this court.

In August following the signing of the bond and the receipt of the certificate I paid the Great Western Insurance Company the remaining $150 which I had agreed to pay, and, with the first payment which, which made $200.00 that I agreed to pay for the ten sahres of stock. The company thereupon returned to me the bond which I signed, and gave it through T. A. Kent, its agent, cancelled and stamped, and I supposed my liability on the stock was at an end. The payments which I made were endorsed on the back of the bond when I received it from Mr. Kent about
132 the 23rd of August, 1871. No one but Agent Long, who represented himself to be a lawyer, and having an extensive knowledge of insurance business in the States of Indiana, Iowa, and Illinois, made any representations of what the law, of Illinois were to me when I signed the bond and took the certificate of stock, at any time prior to the beginning of this suit. He only did so in an indirect manner, by assuring me, and others in my presence, that the amount named in the bond was the extent of the liability assumed. I so believed, and relied upon his statement; paid him $50, as the first instalment, signed the bond, and received the certificate for ten shares of stock; and in August following paid $150.00 more, and received back the bond.

And thereupon the defendant, to further maintain the issues upon his part, called THOS. A. KENT, who, being first duly sworn, testified as follows:

My name is Thos. A. Kent. I reside in Cheyenne. During 1871 was the local agent and manager of the Great Western Insurance Company. (Witness was here shown letter of C. D. Hooker to T. A. Kent,
133 dated 8, 19th, 1871, relating to surrender of defendant's bond.) Have seen this letter before. I got it out of the post-office in Cheyenne Have seen bond No. 1880 before. To the best of my recollection, I received the bond and letter at the same time together, sometime in August, 1871. I delivered the bond according to the instructions in the letter, to D. McLaughlin, taking his receipt therefor. I also paid him at the same time fifty dollars, and he gave me his receipt for $200.00 on account of the Great Western Insurance Company. I was acting as manager of the Cheyenne branch of the company, under its commission to me.

Thereupon the testimony of both plaintiff and defendant closed. And thereafter the plaintiff requested the court to instruct the jury as follows, to wit:

Instructions requested by pl'ff.

1. This is an action brought by the plaintiff, as assignee of the Great Western Insurance Co. of Chicago, Ills., to collect a balance of eighty per cent. alleged to be due upon ten shares of the capital stock of said company held by him, said shares being one hundred dollars
134 each, and upon which it is admitted twenty per cent. has been paid by defendant.

Given.

2. You are instructed that if defendant subscribed for ten shares of the capital stock of said company, and afterwards received and accepted a certificate of stock from the company, or any authorized agent thereof, or if, being a holder of stock, his name was placed on the stock-books of the company, or if he consented to become a holder or owner of stock, and the company in consequence thereof placed his name upon its stock-book, with or without his knowledge, or if he authorized his name to be sent to the company as a subscriber to its stock, and thereafter received and accepted a certificate of stock, in either case he became a stockholder and liable as such.

Given.

3. If you find from the evidence that defendant became in any way a stockholder of the Great Western Insurance Company, and that he continued to hold said stock until after the insolvency of the company, he is liable as such stockholder to the creditors of the company, or their representative, the assignee, to the full amount of stock so held
135 by him, and any agreement with the company, or its agents, limiting his liability to 20 per cent. of the stock, or any endorsement on the certificate of the words non-assessable, are wholly immaterial, and constitute no defense whatever to this action.

Given.

4. The law of a place subject to which a contract is made enters into and becomes part of it; and whatever parties may stipulate, they necessarily contract with reference to the law governing them and the contract, and they are bound to know it, and are bound by it, whether they know it or not, and cannot be heard to urge ignorance of the law as an excuse or defense.

Given.

5. Any contract between the company and its stockholders by which the stock was to be non-assessable after the first 20 per cent. was paid, although it might bind the company in an action between itself and a stockholder, is not valid or binding as between its assignee in bankruptcy and the holder of the stock, and constitutes no defense to an action by him for the full amount of the stock or the unpaid portion thereof.

Given.

136 6. The certificate of stock and the bond given to secure the payment of the first 20 per cent. due thereon must be taken and construed together, and not as independent contracts. And if you find in this case that defendant, in consideration of his receiving ten shares of the capital stock of the Great Western Insurance Company, of the par value of one hundred dollars each, gave his bond for $200, or 20 p'r cent. thereof, and that at or about the same time accepted a certifi-

cate for 10 shares of such stock, in that case you are instructed that the payment of the bond is but the liquidation of a portion of the sum due on the stock held by him, and constitutes no defense to an action by the assignee to recover the balance due thereon upon assessments lawfully made, and defendant is liable in this action for the full amount unpaid and due on said stock to the same extent and with like effect as if said bond had not been given.

Given.

7. The expressed or par value of each share of the capital stock of the Great Western Insurance Co., as stated on the face of its certificates, was, under its charter, one hundred dollars per share.

137 And if the jury find for the plaintiff, they will assess his damages by taking the par value of defendant's stock, deducting whatever payments have been made, and upon such balance they will compute interest at the rate of six per cent. per annum from the 15th day of August, 1872, the date the assessment by the court became due, until the present time.

Given.

(Endorsed on the back as follows, to wit:) Clark W. Upton, assignee, &c., vs. Daniel McLaughlin. Instructions of plaintiff. Filed Dec. 14th, 1876. J. W. Bruner, clerk.

Whereupon the defendant, at the time, objected to the court giving instructions numbered 2, 3, 4, 6 and 7 to the jury as law applicable to the case, which objections were overruled by the court, and to which ruling in relation to each of the aforesaid instructions respectively the defendant then and there excepted.

And thereupon and thereafter the defendant requested the court to give to the jury the following instructions in writing as the law applicable to the case.

Defendant requests the court to instruct the jury:

138 1. That as to all the material allegations in the plaintiff's petition which are denied by the defendant's answer, they must be proved by a preponderance of evidence to entitle the plaintiff to recover in this action, and if they are not so proved then you should find for the defendant.

Given.

2. If any material allegation in the plaintiff's petition has not been proved by a preponderance of evidence, then you should find for the defendant.

Given.

3. The jury are the exclusive judges as to whether or not any fact put in issue by the pleadings has been proved.

Given.

4. It is well settled that the law will not make, nor permit to be made, for parties a contract other than that which they have made for themselves. If from the terms employed the intention and meaning of the parties can be fairly ascertained and determined, then the express terms will govern, and in this sense will be enforced as the contract which the parties have made.

Given.

139 5. In the present case the plaintiff seeks to recover upon a contract alleged to have been entered into between The Great Western Insurance Company and the defendant, and before he can recover he must establish the material averments in the petition by a preponderance of evidence. Therefore, if there is a material variance

between the contract alleged and the one proven, the plaintiff cannot recover.

Given.

6. The law frequently supplies by its implications the want of express agreement between the parties; but it never overcomes by its implications the express provisions of parties.

Refused.

7. If the express provisions of a contract are legal the law yields to them, and does not put in their stead what it would have put by implication if the parties had been silent.

Refused.

8. The courts of this Territory are not presumed to know the laws of the State of Illinois, and cannot take judicial knowledge of them until they are legally proven. Private citizens of this Territory are held to no greater knowledge of the laws of the State of Illinois than
140 the courts, and are not presumed to know the provisions of the statute laws of the State of Illinois. It may be proven that they have or had knowledge of such laws, or that by the exercise of due diligence, which they are bound to exercise, they might have known such laws.

Refused.

9. If the plaintiff in this action bases his right of recovery in this action, either as to principal sum or interest, against the defendant upon the provisions of the laws of the State of Illinois, or upon judicial proceedings taken in any of the courts of the country, then such provisions of the laws of the State of Illinois, and such judicial proceedings, must have been proved to you; otherwise you should find for the defendant.

Refused.

10. Before the plaintiff can recover in this action he must have proved to you by a preponderance of evidence that the defendant has failed to pay money due the plaintiff before the commencement of this action.

Given.

(Endorsed on the back as follows, to wit:) Clark W. Upton, assignee, &c., vs. Daniel McLaughlin. Defendant's instructions. Filed Dec. 14th, 1876. J. W. Bruner, clerk.

141 The court refused to give the instructions numbered 6, 7, 8 and 9; to which refusal to give each of said instructions respectively the defendant then and there excepted.

And thereupon and thereafter the court gave to the jury the following instructions in writing as the instructions of the court:

In the district court, in and for the first judicial district, Wyoming Territory, November term, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Co., of Chicago, Illinois,

vs.

DANIEL MCLAUGHLIN.

Charge of the court.

GENTLEMEN OF THE JURY: The pleadings in this case allege tha

The Great Western Insurance Company, of Chicago, Illinois, was a body corporate, and that the defendant, as a subscriber to the capital stock of said corporation, became a member thereof; that owing to losses sustained by the company it became unable to meet its liabilities, and was, on the sixth day of February, 1872, adjudicated a bankrupt. That the defendant in this action, in the month of February, 1871, subscribed for ten shares of the capital stock; the par value
142 of said stock was one hundred dollars per share. That the defendant paid on his subscription 20 per cent. thereof, amounting to the sum of $200, and that he never made any other payment. That on the 15th day of July an order was issued by the United States district court for the northern district of the State of Illinois requiring the payment of all the unpaid subscriptions to the stock. That the defendant in this suit failed to comply with the terms of the order of the court, and that $800 *dollars* of his subscription remains unpaid, and accordingly this suit is brought for its recovery, with interest from the 15th day of August, 1872, one month after the issuance of the order of the court, the time at which the said order was to take effect.

These and other allegations set up in the petition are submitted to you.

The defendant in his answer admits that the Great Western Insurance Company was a body corporate, and that it was forced into bankruptcy, and that Mr. Upton was duly appointed assignee in bankruptcy, and deny all the other allegations of the petition. He also sets up other defences, but, as they have been stricken out by
143 the court, all you will have to pass upon will be the claim of plaintiff as set out in the petition, on the one hand, and defendant's admissions and denials on the other. If then the plaintiff has established his right to recover by a preponderance of evidence your verdict must be for plaintiff, and the measure of damages will be the amount remaining unpaid on defendant's subscription to the stock of said company, together with interest at the rate of six per cent. per annum from August 15th, 1872. If, on the other hand, the plaintiff has failed to establish any of the material allegations, but they must be material allegations, of his petition by a preponderance of evidence you should find for defendant.

The form of your verdict should be substantially as follows:

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company,
vs.
DANIEL MCLAUGHLIN.

We, the jury in the above-entitled case, find for (and if your verdict shall be for plaintiff you will add) and assess his damages at the sum of $.

Foreman.

144 If you find for defendant you will say after the word "for" defendant.

(Endorsed on the back as follows, to wit:) Clark W. Upton, assignee, &c., vs. Daniel McLaughlin. Instructions of court. Filed Dec. 14th, 1876. J. W. Bruner, clerk.

To which instructions so given the defendant then and there ex-

cepted, because the statements therein are incorrect and ambiguous, and calculated to mislead the jury.

And thereupon and thereafter the defendant presented the following request in writing to the court to go to the jury:

"The jury are requested to find specially upon the following facts: Was the contract between the Great Western Insurance Company and the defendant the contract alleged by the plaintiff in his petition; or was it the contract alleged in the answer by the defendant?

2. "Did the defendant, at the time of making the contract, know the provisions of the statute laws of Illinois relating to insurance
145 corporations and the liabilities of their stockholders, or did he know them at any time prior to the bankruptcy of the Great Western Insurance Company; and, under all the circumstances surrounding his relations, did he use reasonable diligence to learn what his liabilities were?

3. "Were the statements and representations of the Great Western Insurance Company, by and through its authorized agent, made to the defendant at the time he made the contract believed by the defendant and relied upon by him, and were such statements and representations untrue when made?"

Which request the court refused permission to go to the jury, and to which refusal the defendant then and there excepted.

And thereupon the jury retired to deliberate upon their verdict; and afterwards, to wit, on the 15th day of December, returned into court the following verdict:

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company,
vs.
DANIEL MCLAUGHLIN.

146 We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of one thousand and eight dollars ($1,008.00).

R. H. KIPP,
Foreman.

(Endorsed on the back as follows, to wit:) Clark W. Upton, assignee, &c., vs. Daniel McLaughlin. Verdict. Filed December 15th, 1876. J. W. Bruner, clerk.

And thereafter the court, on the request of the defendant, and for good cause shown, made the following order in said case:

November term, 1876. Monday, December 18th, 1876.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company,
vs.
DANIEL MCLAUGHLIN.

On application of Thomas J. Street, esq., of counsel for defendant, it is ordered by the court that the time for filing a motion to set aside the verdict and grant a new trial herein be extended until the end of the present term of this court.

147 And thereafter, to wit, upon the 16th day of February, 1877, the filed a motion to set aside the verdict and grant a new trial, in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Laramie, ss:

In district court, first judicial district.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Co., pl'ff,
vs.
DANIEL MCLAUGHLIN, DEF'T.

Motion for a new trial.

Now comes said defendant, by W. W. Corlett and Thomas J. Street, his attorneys, and moves the court to set aside and vacate the verdict of the jury heretofore rendered and filed in this case, and to order a new trial therein, for the following good and substantial reasons, to wit:

1. Because the court erred in sustaining the demurrer to the fourth ground of defense in the defendant's answer, that is, to the set-off therein pleaded.

148 2. Because the court erred on the trial of said cause in overruling the defendant's objection to the introduction of the laws of the State of Illinois in evidence to the jury, so far as the same were offered to be read to the jury in evidence.

3. Because the court erred on the trial of this cause in admitting in evidence over defendant's objections the proceedings reincorporating the Great Western Insurance Company, and authorizing its capital stock to be increased to five million dollars.

4. Because the court erred on the trial of this cause in admitting in evidence against the objection of defendant certified copy of annual statement of Great Western Insurance Company to the auditor of the State of Illinois.

5. Because the court erred on the trial of this cause in permitting to be given to the jury in evidence document designated 3½.

6. Because the court erred on the trial of this cause in permitting to be given to the jury in evidence over the defendant's objection the deed of assignment to the plaintiff, numbered 7.

149 7. Because the court erred on the trial of this cause in permitting to be given in evidence to the jury over the defendant's objection the certified copy of notice alleged to have been published in the Chicago Daily Inter-Ocean.

8. Because the court erred on the trial of this cause in permitting to be given in evidence to the jury over the defendant's objection the pamphlet publication alleged to have been prepared and distributed by the Great Western Insurance Company.

9. Because the court erred on the trial of this cause in permitting to be given to the jury in evidence over the defendant's objection the certificate of stock.

10. Because the court erred on the trial of this cause in permitting to be given to the jury in evidence over the objections of the defendant the alleged and pretended list of stockholders at Cheyenne, and copy of the original stock-book of Great Western Insurance Company.

11. Because the court erred on the trial of this cause in permit-

ting to be given to the jury in evidence certified copy of notifica-
150 tion to assignee of his appointment and acceptance.

12. Because the court erred on the trial of this cause in refusing to permit the following question to be asked by defendant's counsel of the defendant when called and sworn to testify as a witness in the case on the part of the defendant:

"State all the facts and circumstances connected with the signing of this bond by you, No. 1880, and its delivery to the Great Western Insurance Company; what statements and representations were made to you by said company, if any, relating to the subject-matter of said bond;" to which refusal of the court the defendant at the time excepted.

13. Because the court erred on the trial of this cause in refusing to allow the defendant while being examined as a witness on his own behalf to testify substantially as follows, after counsel for defendant had offered in writing to prove by defendant that "The Great Western Insurance Company, by and through its special and duly authorized agent, Thos. W. J. Long, at and before the signing of said bond in the month of February, 1871, represented and stated to the defend-
151 ant that if he would take ten shares of the stock in the said Great Western Insurance Company he could have them for the sum of two hundred dollars, payable in four instalments of fifty dollars each—fifty dollars down, and the remaining one hundred and fifty dollars in three, six, and nine months thereafter; that said shares of stock would be non-assessable, and that defendant would not incur any liability by reason of taking said ten shares of stock, except the obligation to pay the Great Western Insurance Company therefor the sum of two hundred dollars; that the defendant did agree upon these terms, and upon no other, to take ten shares of said stock in said Great Western Insurance Company; that all the terms and conditions of said agreement were embodied in a printed form, No. 1880, the blanks of which were filled out in writing by said Long, and was signed by this defendant and delivered to said Long as the bond and agreement of this defendant with the Great Western Insurance Company; and that the stock certificate No. 1880 was thereafter delivered by said Long to this defendant, in pursuance of said bond, and as the consideration
152 therefor; that said stock certificate was not received by defendant upon any other agreement, contract, offer, proposition or subscription than herein stated, and reduced to and embraced in said bond; that defendant believed the statements and representations of said Long as to the limit of his liability, and acted upon that belief; and that he knows now that such statements and representations were false;" to which refusal the defendant then and there excepted.

14. Because the court erred on the trial of this cause in this court in refusing to allow the defendant, when being examined as a witness on his own behalf, to be asked by his counsel the following question: "State what, if anything, occurred between you and the Great Western Insurance Company after the return to you of your bond and prior to the bankruptcy of the company relative to its attempt to levy an assessment upon your ten shares of stock?"

15. Because the court erred in refusing to permit the defendant to prove the following facts, which offer was made to the court in writing on the trial of this cause in this court, viz:

153 "That some time after the great fire in Chicago, the exact date of which he cannot now state, he received through the mail one or more printed notifications of some action on the part of persons in

Chicago purporting to be connected with the Great Western Insurance Company, which pretended to be a levy of twenty per cent. upon the par value of each share of stock to meet the losses occasioned by the fire, and that he disregarded the same; that meeting T. A. Keent, agent of the company in Cheyenne, soon thereafter that the latter told him he had sent him one of these notices; that he then informed this agent that he did not propose to pay this assessment, and was answered that Col. Long, the special agent of the company, would be here in Cheyenne in a few days; that in a few days thereafter Long arrived here, came to defendant's office, represented that the company's losses by the fire in Chicago would not exceed $225,000.00; that the payment of these losses would exhaust the available assetts of the company and leave it without funds to carry on its business, and therefore it was deemed best by those having the management of its affairs in Chicago to
154 make this additional call upon the holders of stock in the company, so that it could promptly pay up all of its losses, and go on with its business with its capital unimpaired; that this would be a great advertisement for the company and make it one of the best in the country; and that he would not take sixty cents on the dollar for the stock he then owned. That thereupon the defendant called his attention to the contract that he had made and complied with, and that Long then stated that no assessment could be enforced here, and that the payment of the assessment if made would be wholly voluntary. He urged the defendant the policy of paying this assessment, and urging upon the other stockholders in Cheyenne to promptly pay this assessment.

"That the defendant then stated to Agent Long that he did not consider himself bound to pay any more on the stock than he had agreed to pay and did pay, and that he did not feel like making any voluntary payments to the company, and offered to return the stock to the company, or transfer it to Long for the two hundred dollars which
155 he had paid;" to which refusal the defendant then and there excepted.

16. Because the court erred on the trial of this cause in giving to the jury the second instruction asked by the plaintiff.

17. Because the court erred on the trial of this cause in giving the third instruction to the jury asked by the plaintiff.

18. Because the court erred on the trial of this cause in giving to the jury the fourth instruction asked by the plaintiff.

19. Because the court erred in giving to the jury on the trial of this cause the sixth instruction asked by the plaintiff.

20. Because the court erred on the trial of this cause in giving to the jury the seventh instruction asked by the plaintiff.

21. Because the court erred on the trial of this cause in refusing to give to the jury, as the law applicable to the case, the sixth instruction asked by defendant.

156 22. Because the court erred on the trial of this cause in refusing to give to the jury, as the law applicable to the case, the seventh instruction asked by the defendant.

23. Because the court erred on the trial of this cause in refusing to give to the jury, as the law applicable to the case, the eighth instruction asked by the defendant.

24. Because the court erred on the trial of this cause in refusing to give to the jury, as the law applicable to the case, the ninth instruction asked by the defendant.

25. Because the court erred on the trial of this cause in its written

instructions to the jury, as the statements therein are incorrect and ambiguous, and were well calculated to mislead the jury.

26. Because the court erred on the trial of this cause in refusing the written request made by the defendant that the jury might find specially upon the following facts, viz:

1. "Was the contract between the Great Western Insurance Company and the defendant the contract alleged by the plaintiff in his
157 petition, or was it the contract alleged in the answer by the defendant?

2. "Did the defendant at the time of making the contract know the provisions of the statute laws of Illinois relating to insurance corporations and the liabilities of their stockholders, or did he know them at any time prior to the Great Western Insurance Company; and, under all the circumstances surrounding his relations, did he use reasonable diligence to learn what his liabilities were?

3. "Were the statements and representations of the Great Western Insurance Company, by and through its authorized agent, made to the defendant at the time he made the contract, believed by the defendant and relied upon by him; and were such statements untrue when made?"

27. Because the verdict is not sustained by sufficient evidence.

28. Because the verdict is contrary to law.

W. W. CORLETT,
Att'y for Def't.

(Endorsed on the back as follows, to wit:) In dist. court. Clark W. Upton, assignee, &c., vs. D. McLaughlin. Mo. for new trial. Filed Febr'y 16th, 1877. J. W. Bruner, clerk. Corlett and Street, att'ys for def't.

158 And thereafter, to wit, on the 20th day of March, 1877, the court denied the motion for a new trial; to which order and ruling of the court in refusing to grant a new trial the defendant then and there accepted.

And thereupon, on said last date, upon motion of plaintiff's counsel, the court rendered judgment in favor of said plaintiff and against said defendant for one thousand and eight dollars and costs of the action, taxed at $.

To which order and judgment the defendant then and there excepted.

The foregoing pages contain all the evidence on both sides in the trial of said cause.

And now at this time, to wit, March 31st 1877, in open court, it being one of the days of the November term, 1876, said defendant prays that the court may allow and sign this his bill of exceptions and order that the same may be made a part of the record in this case, which is now here done in open court the day and year last above written.

Allowed in open court this 31st day of March, A. D. 1877.

159 J. W. FISHER, [SEAL.]
Judge, &c.

(Endorsed on the back as follows, to wit:) In district court. Clark W. Upton, assignee in bankruptcy, &c., vs. Daniel McLaughlin. Bill of exceptions.

It is mutually agreed by and between the plaintiff and defendant that the references herein to the instructions asked, given, and refused

by the court, and the motion for a new trial, may be considered the same as if set out in full herein, provided that the transcript shall contain the same in full.

E. P. JOHNSON,
Att'y for Pl'ff.
THOS. J. STREET & W. W. CORLETT,
Att'ys for Def't.

MARCH 31, 1877.

Filed in open court March 31st, 1877.

J. W. BRUNER, *Clerk.*

CORLETT & STREET,
Att'ys for Def't.

During the trial of this cause the following additional entries were made in the journal of said court at the regular November term,
160 A. D. 1876, under their respective dates, to wit:

November term, 1876. Thursday, December 14th, 1876.

CLARK W. UPTON, ASSIGNEE, &C.,
vs.
DANIEL MCLAUGHLIN.

Come now the parties to this action with their attorneys, heretofore mentioned, and thereupon the taking of testimony herein is proceeded with and closed and the argument of counsel commenced, and the same not being concluded at the hour of adjournment the jury herein are again, by consent of parties, allowed to separate until to-morrow morning.

November term, 1876. Friday, December 15th, 1876.

CLARK W. UPTON, ASSIGNEE OF GREAT WESTERN Insurance Co.,
vs.
DANIEL MCLAUGHLIN.

Come now the parties to this action with their respective attorneys, heretofore mentioned, and thereupon the argument of counsel herein is proceeded with and concluded, and thereupon the court
161 immediately and without proceeding with other business charged and instructed the jury in regard to the law governing this case; after which the said jury retired to deliberate upon their verdict, in charge of W. H. Conley as bailiff, who was then and there sworn to discharge his duties as such according to law; and thereafter came the said jury into court, in charge of their bailiff aforesaid, with their written verdict, which said verdict is in words and figures as follows, to wit:

"CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY
"of the Great Western Insurance Company,
"*vs.*
"DANIEL MCLAUGHLIN.

"We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of one thousand and eight ($1,008.00) dollars.

"R. H. KIPP, *Foreman.*"

Which said verdict was duly received, announced and recorded in the presence of the parties herein, and thereupon the said jury were discharged from further consideration of this case.

November term, 1876. Friday, March 20th, 1877.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY
162 of the Great Western Insurance Company,
vs.
DANIEL MCLAUGHLIN.

Now comes the said plaintiff, by his attorney, E. P. Johnson, esq., and the defendant being present and represented by his attorneys, W. W. Corlett and Thos. J. Street, esq'rs, and the court having had the defendant's motion for a new trial in this cause under consideration, and being now fully advised in the premises, it is ordered by the court that said motion for a new trial herein be, and is, overruled; to which said ruling of the court the defendant, by his said attorneys, then and there excepted. Thereupon the said plaintiff, by his said attorney, moved the court for judgment on the verdict filed in this case. Whereupon it is now ordered and adjudged by the court that the said plaintiff, Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, have and recover of the defendant, Daniel McLaughlin, the sum of one thousand and eight ($1,008.00) dollars, and the costs of this action, taxed in the sum of $, and that execution issue therefor.

163 November term, 1876. Saturday, March 31st, 1877.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY
of the Great Western Ins. Co.
vs.
DANIEL MCLAUGHLIN.

Come now the parties herein by their attorneys, hereinbefore named, and thereupon the said defendant, by his attorneys, W. W. Corlett and Thos. J. Street, esq'rs, present their bill of exceptions, which are agreed upon by both parties to this suit. Whereupon said bill of exceptions are now allowed by the court, signed and sealed by the judge thereof, and ordered to be made a part of the record herein.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, J. W. Bruner, clerk of the district court within and for said county of Laramie, in the Territory aforesaid, do hereby certify that the foregoing pages do contain true copies of the petition, answer, demurrer, orders of the court, journal entries, verdict, order of court ex-
164 tending time in which to file motion for new trial, motion for new trial, order of court overruling same, judgment entry, statement of the evidence adduced and offered on the trial, exceptions taken to same, instructions asked to be given to the jury given and refused and exceptions taken to same, instructions to the jury by the court, and exceptions taken to portions of the same, and of the bill of exceptions in full, allowed, signed by the court and ordered made a part of the record herein, so full and entire as the same appears of record and on the files of said court in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at Cheyenne City, this 16th day of April A. D. 1877.

[SEAL OF THE COURT.] J. W. BRUNER,
Clerk District Court.

(Endorsed on the back as follows, to wit:) In supreme court, Wyoming Territory. Daniel McLaughlin, plaintiff in error, vs.
165 Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, defendant in error. Filed in open court by leave of the court this 18th day of April, A. D. 1877.

J. W. BRUNER,
Clerk Supreme Court.

And thereafter, to wit, on the 22d day of May, A. D. 1879, the same being one of the regular days of the March term, 1879, of the supreme court of Wyoming Territory, the following judgment was entered of record on the journal of said court, in the cause aforesaid, in the words and figures following, to wit:

March term, 1879. Thursday, May 22d, 1879.

DANIEL MCLAUGHLIN, PLAINTIFF IN ERROR,
vs.
CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, defendant in error. } No. 107.

This cause came on for hearing upon the petition in error, the transcript of the record, and the papers and pleadings from the district court of the first judicial district of the Territory of Wyoming,
166 within and for the county of Laramie, and was argued by counsel. On consideration whereof, the court find that there is error therein, apparent upon the record, to the prejudice of the said Daniel McLaughlin, plaintiff in error.

It is therefore considered by the court that the judgment aforesaid be reversed and held for nought, and the court, further proceeding to render such judgment as the said district court ought to have rendered, find that said court had no jurisdiction of said cause; that the said judgment was rendered in favor of the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, of Chicago, Illinois, defendant in error, and against the said Daniel McLaughlin, plaintiff in error, when by the law of the land it should have been rendered in favor of the said Daniel McLaughlin, plaintiff in error, and against the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, of Chicago, Illinois:

It is therefore considered by the court that judgment be rendered herein in favor of the said Daniel McLaughlin, plaintiff in error, and against the said Clark W. Upton, assignee in bankruptcy of the Great West-
167 ern Insurance Company, of Chicago, Illinois, defendant in error, and that the said plaintiff in error recover from the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, of Chicago, Illinois, defendant in error, his costs herein expended, taxed at fifty-nine & $\frac{25}{100}$ dollars; to which judgment and opinion of the court Mr. Justice Jacob B. Blair dissents. It is further ordered that this judgment be remanded to the district court of the first judicial district of the Territory of Wyoming, within and for the

county of Laramie, for execution, and that a special mandate be sent to said court therefor.

And on the same said 22nd day of May, A. D. 1879, there was filed in said court, in the cause aforesaid, the opinion of the court, in the words and figures following, to wit:

168 Territory of Wyoming. Supreme court, March term, 1879.

DANIEL MCLAUGHLIN, PL'FF IN ERROR,
vs.
CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Co., def't in error.

Opinion of the court by Mr. Justice Peck.

It appears on the part of the assignee, the plaintiff below, that on the 14th day of February, 1871, the company made a contract, dated on the 6th of the month, with McLaughlin, of the sale to him of ten shares of its unpaid capital stock, of the par value of $1,000, for the consideration of $200 in full; that, in pursuance of the contract, the ten shares were delivered on its execution, and the $200 paid by the 19th day of August following. The suit is to recover upon the contract $800, the balance of the par value of the ten shares, as a balance due by the contract, and interest. Whether, the district court having jurisdiction, the assignee could recover upon that contract, as for a balance and its interest, in order to recover, should have rescinded the contract
169 as void for fraud against the co., and have sued for damages committed by the fraud, which consisted of that transaction, and of which the instrument of February 6 was but an element, are questions that we do not consider, because of our conclusions upon the antecedent subject of jurisdiction. If the court having jurisdiction, there is such right of recovery upon the contract, it arises by converting a contract which in terms (and they are most explicit to that effect) became mutually executed on the payment of the $200, into an executory contract against McLaughlin as to the $800 and interest, and this to effectuate the principle that the law which requires the co. to affix a par value to its stock also forbade its parting with the stock except for an actual and bona-fide equivalent, so as to protect creditors by enabling them to rely absolutely upon its capital as actual, not fictitious. The assignee treats the contract as executory upon this principle, and seeks to recover upon it accordingly. Hence, by the theory of the suit, the alleged claim is for a balance of the price or value of unpaid stock, which balance, if due at all, was due on the 14th day of February, 1871, when the stock was delivered, and therefore, on the 11th day of April, 1872, when the assignee was appointed. (22 How., 380,
170 Ogilvie, Knox Ins. Co.; 5 Otto, 628, Tury & Anderson.) It also appears on the part of Upton, that the bankrupt court, on the 5th day of July, 1872, duly ordered this balance to be paid to him by August 15th, 1872, and that, in pursuance of that order, notice was given to McLaughlin on the 15th day of the same July. Therefore, whether the date at which the alleged claim accrued to the assignee be treated as the date of his appointment or the date designated in the order for payment is immaterial to the enquiry whether the district court had jurisdiction of the suit; for, in either view, more than two

years had expired between the maturity of the claim and his commencement of suit.

The bankrupt act of March 2, 1867, at section 2nd, 14 U. S. S. at L., 518, declares that "No suit at law or in equity shall in any case be maintainable by or against the assignee in bankruptcy, or by or against any person claiming an adverse interest, touching any property or rights of property transferrable to or vested in such assignee in any court whatsoever, unless the same be brought within two years from the time when the cause of action accrued for or against such assignee; provided that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

The bankrupt acts, at section 5057 of the U. S. Rev. Stat., declares
171 no suit either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferrable to or vested in such assignee, unless brought within two years from the time when such cause of action accrued for or against such assignee; and this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." The sections are identical in substance. The statute creates an officer unknown, and for purposes unknown to the common law. What it creates it can limit. The officer has his origin in the statute; his existence begins and ends in it, and his capacity is measured by it. The difference between the objects respectively aimed at by a statute of merely remedial limitation and *and* the present statute indicates the difference between the constructions which are to be applied to them. The former seeks to protect a party from an alleged liability upon a claim that after a prescribed period is presumed to be fictitious, either because it never existed or, if it did, has been satisfied; the latter to secure to creditors the largest benefit of a common fund by speed and economy in the administration of it, the paramount importance of which purpose, as peculiar to a bankrupt act, is manifest from the indefinite variety, extent, and complication of assets to be administered and of claims to be adju-
172 dicated against them. The clear intention of the act in question was to impose two years as the absolute limit to the capacity of the officer within which to sue or be sued, and this, in order to promote dispatch in the liquidation of the bankrupt estate, avoiding the indefinite, wasteful, and vexatious delays which would be necessarily consequent upon the power of waiver were this provision a limitation of the remedy alone. The last clause of each section, namely, that it shall not in any case revive a right of action, barred when the assignee is appointed completely matches this construction, and it would be inconsistent with the body of the act were that to be construed as a mere limitation upon the remedy, for then it would in one time forbid the revival of actions barred at the time of the appointment, and permit the revival of whatever might become subsequently barred—a senseless incongruity. Hence, after the two years, for all the purposes of suit being commenced by or against the assignee, his office has expired and his existence ceased. As he is powerless to acquire, so the court is powerless to admit him to a status within the court. This want of power is want of jurisdiction. We should not hesitate so to construe the statute were it to read "No suit shall be commenced in any court," instead of "No suit shall be maintained in any court," as it now reads. "Maintainable" signifies capable of being maintained; "not maintainable," incapable of being maintained. Declaring
173 that no suit shall be capable of being maintained if com-

menced after the two years, or that every suit commenced after that period shall be incapable of maintainence, the section declares that a suit so commenced shall be a subject on which no court shall act, that is, shall be capable of acting; but the words "not maintainable" are employed ex industria, intending to preclude all doubt that might attend an implied construction, by inhibiting in express and explicit terms the officer and claimant from instituting suit after the prescribed period, and the court from entertaining it if instituted. This is the especial function of the terms "not maintainable," as employed in the contest. They go beyond the parties and reach the very jurisdiction of the court, defining it as to subject-matter. This construction of the two years' clause concurs with the unmistakable spirit and intent of the rest of the act; for in its large, consistent, and careful provisions for suits, summary hearing, compromise, and other proceedings essential to the administration of the estate, it expresses the one general purpose of thrifty conversion and early distribution. The provision, then, which is under enquiry is jurisdictional; and a suit instituted in violation of it would be coram non judice and void. Since reaching this conclusion we have examined Bailey, assignee in bankruptcy of Benjamin Glover, vs. Glover et als., 21 Wall., 342. We derived the impression at the hearing that the case expressed only a dictum in favor of this view;
174 we find that has a graver aspect. It was a suit in equity brought by Bailey against Elenora Glover and others, in the circuit court of the United States for the southern district of Alabama, to vacate a conveyance of property made by the bankrupt to the defendants in fraud of the act. It appeared by the bill that the assignee was appointed on the 1st day of December, 1869, and brought the suit on the 20th day of January, 1873; that the fraud was committed prior to the appointment, but kept secret by the parties to it from the assignee, so that he was prevented from discovering it until within two years next before the commencement of the suit; the defendants demurred; the demurrer was sustained by the court below, and the assignee appealed; the Supreme Court reversed, with a modification sustaining the general principle of the decree below, simply modifying its application to the special features of fraud. The opinion of the court was delivered by Mr. Justice Miller; he says of the second section of the act of 1867, "This is a statute of limitations, and is precisely like other statutes of limitations," and stopping at this remark, a hasty conclusion would be that he was speaking of the statute as merely an act of limitation upon the remedy; it is, however, observable that the expression, viewed literally, does not indicate whether it referred to an act of remidial or to one of jurisdictional limitations; the contest, however, unmistakably indicates that it referred to the latter, and this we proceed to shew. If a bar of limitations is simply remedial it does not impair the right of action or defense; cannot be raised by demurrer; can only be raised by plea; and this whether the facts on which it is raised do or do not previously appear in the record. If the bar of limitations is jurisdictional it does impair the right of action or defense, and may be raised by demurrer or motion, when the ground of the bar appears in the record;
175 though if the parts do not so appear they must be plead in order to present the jurisdictional bar. This distinction between the several functions of a demurrer and a plea under a limitations act is a perfect key to Bailey vs. Glover and others, sufficing to determine its scope as a decision. The demurrer in the case was interposed upon the theory that the section prescribed a jurisdictional bar, and that in

applying the bar the time would be computed from December 1st, 1869, the date of the assignee's appointment, and not from the discovery by him of the fraud. The demurrer might have been overruled upon either of two grounds: one, that the bar was remedial, the other, that it was jurisdictional, but in applying it as such the time would be computed from his discovery of the fraud; but the demurrer could have been sustained only upon the ground that the bar was jurisdictional. Now, how did the circuit and supreme courts treat this demurrer? The former sustained it on the ground that the time began with the date of appointment and dismissed the bill. The latter sustained it with the modification already stated. Having made the remark, "This is a statute of limitations, and is precisely like other statutes of limitations," Judge Miller proceeded as follows: "And applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. It is obviously one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets. This only second in importance to secur-
176 ing equity of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual methods of trial, attended by some necessary delay. To prevent this as much as possible, Congress has said to the assignee, 'You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits where the cause of action has accrued more than two years against you; within that time the estate ought to be nearly settled up and your functions discharged.'" This policy of the limitation's clause, and the ground of it, as so explained by that court, are utterly incompatible with the idea that the bar is under the controll of the parties, not of the court, and is compatible alone with the idea that it is under the control of the court, and not of the parties; but, as if to put its view upon the subject beyond doubt, the court concludes its explanation of the policy with the further remark that by the two years' clause Congress declares, "We close the door to all litigation not commenced before that period has elapsed." The conclusion is unavoidable, if the door may be closed or opened at the will of the parties, Congress does not close it, and the section provides but a remedial limitation; if Congress closes it, the parties cannot open it, and the *and the* section imposes a jurisdictional limitation; thus far the Supreme Court fully sustained the circuit court, but, following the analasis furnished by the practice under a remedial bar of limitations, further held that when it appeared that there had been no laches upon the assignee's part in learning of the fraud, which was the basis of the action, and the
177 fraud had been concealed, or was of such a character as to conceal itself from him, the statute did not begin to run till it had been discovered by or become known to him or his privies, and so reversed, with direction to proceed according'; thus the Supreme Court decided that if the concealment of the fraud did not appear in the bill the bar would begin with the appointment; that if it did so appear the bar would begin with the discovery; and if more than two years had elapsed between the commencement of the bar and the commencement of suit a demurrer would lie and the bar be raised; and upon the unavoidable distinction between a demurrer and a plea this was deciding that the second section of the act of 1867 prescribed a jurisdic-

tional limitation. Hence, if we have correctly interpreted Bailey against Glover, the Supreme Court has adjudicated the question, and its adjudication is a rule to us. We add that the rule so laid upon us entirely accords with our preconceptions, derived from the statutes alone. We now advert to several cases which have since been decided upon the Federal circuit. We refer to them, not that the decisions cisions or opinions of an inferior can be looked into as improving or supporting a decision of the Supreme Court of the United States, but because those circuit cases contain proof that our interpretation of the appellate decision in Lailey vs. Glover and others is correct. In Milt nbarger and Norton, assignees in bankruptcy, against Phillips, 3 Woods, 114, it appeared by the petition that the cause of action accrued on the appointment of the assignee, and that the suit was commenced more than two
178 years after; the defendants excepted, which under the civil-law practice of Louisiana was equivelent to a demurrer as to the common law; the circuit court sustained the exception upon Bailey vs. Glover as a controlling decision. In 4 Dillon, 386, Peyson, assignee in bankruptcy, against Coffin, the defendant plead that the cause of action did not accrue within two years before the suit was brought; the report does not shew that that fact previously appeared upon the record; the plaintiff demurred; the plea was adapted to either of two theories, the theory that the bar was remedial, the theory that it was jurisdictional, and if the lapse of time between the accruing of the claim and the commencement of the suit did previously appear in the record, the plea, instead of a demurrer, may have been resorted to for the purpose of securing to the defense whatever the two constructions the act might receive; the plea was sustained, and on which of these grounds the report does not indicate; but in Walker, assignee in bankruptcy, vs. Turner, same volume, at page 165, according to Judge Dillon, Judge Miller deciding, Payson vs. Coffin, orally, put his conclusion upon the Bailey and Glover case and what he regarded as the obvious policy of the two years' clause, and the almost necessary result of its peculiar phraseology. Judge Dillon attributes to Judge Miller the use on that occasion of the following expressions, namely: That his decision of Payson vs. Coffin was "strongly supported by the views of the Supreme Court in Bailey vs. Glover." At first glance it might be said that that language rather referred to a dictum than to a decision, and that Judge
179 Miller would not probably have employed it had he been referring to an adjudication of the Supreme Court; and this idea would have especial force had Judge Miller's expression been this, "Supported by the views of the judge who delivered the opinion in Bailey & Glover;" but when he said, "Supported by the view of the Supreme Court in Bailey and Glover," he must be taken to have studiously based his remark upon this, the fixed rule for the interpretation of decisions, namely, that all that binds an appellate court, and therefore all that can be regarded as its views in its opinion delivered by a single member, is the conclusion and its reasons, for which two elements the court is alone responsible; all matters dictum, contained in the opinion, being merely the view or views of that judge, and for which he alone is responsible; therefore, correctly understood, Judge Miller treated that case as an adjudication of the Supreme Court upon the subject, and accordingly sustained the plea in Payton and Coffin on the ground that it presented a jurisdictional bar. In Walker and Turner the limitation was plead, and the defense thus adapted to the alternation theories of the clause; the plea was demurred to, and was sustained as presenting a jurisdictional bar. In Foreman, assignee in

bankruptcy, vs. Bigelow et alts., 7 Cent. L. J., 430, at the first circuit, Judge Clifford, on the authority of Bailey v Glover, sustained a demurrer to a bill in equity upon the ground that two years had elapsed between the accruing of the cause of action and the commencement of suit. In Tappan, trustee in bankruptcy, vs. Whittemore estate, decided, as we understand, after the 21 of Wallace, on demurrer interposed to the complaint upon the ground that the claim was
180 barred under section 5057 (which appliet equally to trustees as to assignees) Judge Wallace overruled the demurrer because the two years had not elapsed, holding that it would have been sustained had the reverse appeared; he followed the 21 of Wall. without alluding to it, and we necessarily assume that he knew of it when he made his decision. We therefore hold that the district court had no jurisdiction of the present suit.

Is the record in a condition to enable us to act upon the defect? From the conclusion already reached, it would seem to be a necessary result that the petition does not state a right of action, unless it affirmatively shews that the suit is brought within the two years, and that not shewing it, it is substantially defective; the present petition is thus defective; the third and fourth answers were each demurred to, the demurrer sustained, and judgment rendered upon them against the defendant; whether these answers were defective or not, the demurrers reached back to the petition as containing a substantial defect, and judgment on each demurrer should have been rendered against the assignee; hence the defendant's exception to the judgment, as rendered on the demurrer, was well taken.

Again, it affirmatively appears in the record in two instances that the district court had no jurisdiction of the suit. The petition shews that the claim accrued so early as April 11, 1872, certainly no latter than August 15, 1872; the official filing of the petition that the suit was commenced on April the 8th, 1876. Upon the trial the deed of appointment, executed on April 11, 1872, was offered, and admitted in
181 evidence, and became thus coupled with the filing of the petition; thus the defect of jurisdiction twice appears upon the record. The purpose of the offer was to shew that the assignee was competent to sue, and the court to entertain the suit; the effect of the offer was the reverse; the admission of the deed was objected to as incompetent, and on exceptions taken; the objection was perfect and must be sustained.

But the objection was superfluous. Want of jurisdiction over subject-matter is a radical, and therefore an incurable, defect. The parties cannot waive nor can the court ignore it. A court does not create its jurisdiction; it must accept, and confine itself to what is created for it; hence ex necessitate such defect of jurisdiction carries its objection with it; appearing in the case, it is the imperative duty of the court, of its own motion, to treat the proceedings as null, and dispose of them accordingly, for this is its only power in the given case. Mr. Gould, in his Pleadings, thus states the rule: "It is a fatal objection to the jurisdiction of any court that it has not cognizance of the subject-matter of the suit, i. e., that the nature of the action is such that the court is under no circumstances competent to try. In such case neither a plea to the jurisdiction nor any other plea would be necessary to oust the jurisdiction of the court. The cause might be dismissed on motion, and, even without motion, it would be the duty of the court to dismiss it, ex-officio, for the whole proceeding would be coram
182 non judice and utterly void." So this we add, that the rule is ab-

solutely uniform, and is so plain and familiar that further citation in its support would be unbecoming. The words of the act, "not maintainable," here recur, for in the light of the above elucidated principle they constitute an express direction to the court to refuse to entertain a suit so forbidden by the statute.

It follows that it was the duty of the district court, on inspection of its record, and of its own motion, to dismiss the suit. It having proceeded to exercise jurisdiction, and render judgment for the assignee, it is our duty to reverse, and we do reverse the judgment and dismiss the action, and with costs to the plaintiff in error of the district court and of the appeal.

It is due to the learned chief justice who tried the case below to say that the suit was tried there on both sides without a limit against or an apparent doubt of jurisdiction; that the construction now given to the statute is a recent idea; and that it is not remarkable that his attention was diverted from a point that was not suggested at the bar in a case which was represented by competent counsel and sharply contested.

Which said opinion is endorsed on the back in the words and figures following, to wit:

No. 107. Territory of Wyoming supreme court, March term, 1879. Dan. McLaughlin, pl'ff in error, vs. Clark W. Upton, assignee of the Great Western Insurance Co., def*f*. in error. Opinion of the court by Mr. Justice Peck. Filed May 22nd, 1879. J. W. Bruner, clerk.

183 And thereafter, to wit, on the first day of August, A. D. 1879, there was filed in the above cause a citation in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Territory of Wyoming, ss:

To DANIEL MCLAUGHLIN, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Wyoming, wherein Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, is plaintiff, to show cause, if any there be, why the judgment in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of August,
184 in the year of our Lord one thousand eight hundred and seventy-nine.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, Edward P. Johnson, being duly sworn, on oath say that I served the foregoing citation, by delivering a true copy thereof to McLaughlin & Steele, and to William R. Steele, one of the attorneys of record of defendant in error, August 1st, 1879.

E. P. JOHNSON.

Sworn to and subscribed to me this 1st day of August, A. D. 1879.

J. W. BRUNER,
Clerk Supreme Court.

(Endorsed on the back as follows, to wit:) No. 107. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Daniel McLaughlin. Citation to October term, A. D. 1879. Filed Aug. 1st, 1879. J. W. Bruner, clerk supreme court.

185 And on the same said 1st day of August, A. D. 1879, there was filed in the clerk's office of said supreme court an affidavit of the value of matter in dispute in the words and figures following, to wit:

Supreme Court of the United States.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff in error,
vs.
DANIEL MCLAUGHLIN, DEFENDANT IN error.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, Edward P. Johnson, being duly sworn, on my oath say I am attorney for defendant in this cause in the supreme court of Wyoming Territory, and that the matter in dispute, exclusive of costs, exceeds the sum of one thousand dollars in value.

EDWARD P. JOHNSON.

Sworn to and subscribed before me this 1st day of August, A. D. 1879.

186 J. W. BRUNER,
Clerk Supreme Court.

(Endorsed on the back as follows, to wit:) No. 107. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Daniel McLaughlin. Affidavit of the value of matter in dispute. Filed August 1st, 1879. J. W. Bruner, clerk.

And on the same said 1st day of August, A. D. 1879, there was filed in the clerk's office of said supreme court a bond for review on writ of error in the words and figures following, to wit:

Supreme Court of the United States.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, pl'ff in error,
vs.
DANIEL MCLAUGHLIN, DEP'T IN ERROR.

187 Know all men by these presents that we, Abram Underwood, Charles W. Riner, and Hartwell S. Tracy, of Cheyenne City,

Laramie County, Wyoming Territory, are held and firmly bound unto Daniel McLaughlin in the sum of five hundred dollars, to be paid to the said Daniel McLaughlin, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 1st day of August, A. D., 1879.

Whereas Clark W. Upton, assignee as aforesaid, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in this action by the supreme court of Wyoming Territory:

Now, therefore, the condition of this obligation is such that if the said Clark W. Upton shall prosecute this writ of error to effect, and answer all costs if he shall fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

ABRAM UNDERWOOD. [SEAL.]
CHARLES W. RINER. [SEAL.]
HARTWELL S. TRACY. [SEAL.]

188 I hereby approve the above bond.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

(Endorsed on the back as follows, to wit:) No. 107. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Daniel McLaughlin. Bond for review on writ of error. Filed August 1st, 1879. J. W. Bruner, clerk.

Supreme court, Wyoming Territory.

I, J. W. Bruner, clerk of the supreme court of the said Territory, do hereby certify that the above and foregoing pages contain a full, true, and correct copy of the petition in error and transcript, journal entry of judgment, opinion of the court, citation, affidavit of the value of matter in dispute, and bond for review on writ of error in the case en-
189 titled Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Daniel McLaughlin, so full and entire as the same remains on file and of record in the clerk's office of said supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne City, this 28th day of August, A. D. 1879.

[SEAL.]

J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

Cost of this transcript, $61.40.

TERRITORY OF WYOMING, *ss:*

I, J. W. Fisher, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, now is, and was at the time of signing and sealing the same, the clerk of said supreme court and the keeper of the records and seal thereof, and that said clerk was duly appointed
190 and qualified to office, and that full faith and credit are, and of right ought to be, given to all of his official acts as such clerk in all courts of record in the United States and elsewhere; that his said

certificate is in due form of law, and that his signature thereto is genuine.

Witness my hand this 30th day of August, A. D. 1879.

J. W. FISHER,
Chief Justice of Wyoming Territory.

(Indorsement on cover:) No. 261. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, pl'ff in error, vs. Daniel McLaughlin. Wyoming Ter't'y supreme court. Filed 22d September, 1879.

OFFICE SUPREME COURT U.S.
FILED
FEB 25 1882
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY,
Plaintiff in Error,
vs.
DANIEL MCLAUGHLIN,
Defendant in Error.

Error to the Supreme Court of the Territory of Wyoming.

No. 261.

Brief and Argument for Plaintiff in Error.

HOMER COOK,
For Plaintiff in Error.

CHICAGO, ILL.:
S. J. BRADBURY & SONS, LEGAL PRINTERS, 78 FIFTH AVE.
1881.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1881

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT

NOTE.

The questions involved in this case are identical with those in case No. 260, for which reason this brief is a substantial duplicate of the one in that case.

STATEMENT OF THE CASE.

The plaintiff in error, as the assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, brought this action in the District Court of the First District of the Territory of Wyoming, against the defendant in error, to collect a balance of eighty per cent. alleged to be due upon ten shares of $100.00 each of the capital stock of said company, together with interest on said balance.

Said company had been chartered by the Legislature

of the State of Illinois in 1857 with a fixed capital of $100,000, but in 1870, acting under the general insurance laws of that State it obtained the right to increase its capital stock to $5,000,000. On the 6th of February, 1871, the defendant in error became the owner of ten shares of this increased capital stock, upon which he paid but twenty per cent. of the par value. A certificate for said stock was duly issued to him, across the face of which were stamped the words "*Non assessable.*"

The company carried on the business of fire insurance in Chicago until the great fire of Oct. 9, 1871, and although rendered insolvent in consequence of the heavy losses sustained by said fire, yet it struggled for a few weeks to continue to do business, but on the 6th of February, 1872, it was duly adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, upon a petition filed against it for that purpose on the 17th of January, 1872.

The plaintiff in error was appointed assignee in bankruptcy of said company on the 11th day of April, 1872.

On the 5th of July, 1872, the said court, upon due application by the assignee, made an order that the amount unpaid on the capital stock of said company should be paid to the said assignee on or before the 15th day of August, 1872.

The defendant in error having failed to pay the balance due upon his stock, in accordance with the terms of the said order, and being a resident of the Territory of Wyoming, this suit was commenced against him in the said District Court of the First District of said Territory on the 8th day of April, 1876, by petition, under a code practice in that Territory.

To the petition of the plaintiff in error, the defendant in error answered:

1st. That he was not indebted, etc., but admitted that he subscribed for the ten shares of stock.

2d. That by the contract of subscription he was not to pay but $200 for said ten shares, being twenty per cent. of the face value, and that he had paid that sum as he had contracted to do.

3d. That when he subscribed for said stock he was a resident of Wyoming, and was not bound to know, and did not know, the laws of the State of Illinois; that at the time he subscribed, the company represented to him that said ten shares would be forever non-assessable, and that he would never be called upon or liable for any other sum on account of said stock, except said $200; that, relying upon and believing that such representations were true, he subscribed, etc.

4th, and lastly. The defense of set-off was interposed. (See pages 7, 8 and 9, printed Record.)

To the defense of set-off the plaintiff demurred and the District Court sustained the demurrer.

In December, 1876, a trial by jury was had resulting in a verdict and judgment in favor of the plaintiff for $1,008.00, being the balance unpaid and interest on the same. The defendant then sued out a writ of error to the Supreme Court of the Territory, which court in May, 1879, reversed the judgment of the District Court and dismissed the suit, and thereupon the plaintiff in error brings the suit to this court by a writ of error.

From the opinion of said Supreme Court of Wyoming, found on pages 63–4–5–6 of the printed record, it will be seen that said court held, that inasmuch as over

two years had elapsed since the cause of action had accrued to the plaintiff in error, the suit was barred under the limitations provided by section 2 of the Bankrupt Act of 1867, now section 5057 of the Rev. Statutes of the United States.

That although this two year's statute of limitation had not been pleaded or in any other manner interposed as a defense by the defendant in error in the District Court, yet as this bar of limitation was jurisdictional, and as the ground of the bar appeared from the record, that it was the duty of the District Court, on inspection of the record, and of its own motion, to have dismissed the suit.

Itappeared from the record that this suit was not commenced within two years from the time the cause of action accrued, the plaintiff in error having been appointed as such assignee on the 11th of April, 1872, and the Bankrupt Court having on the 5th of July, 1872, ordered the balance remaining unpaid upon the stock to be paid to the assignee by the 15th of August, 1872, and the suit not having been commenced until the 8th of April, 1876; therefor whether the date at which the claim accrued to the assignee be treated as the date of his appointment, or the date designated in the order for payment, over two years had intervened in either case.

Assignment of Errors.

The plaintiff in error assigns, and relies upon, the following errors in the record of the Supreme Court of Wyoming Territory:

First—The Court erred in reversing the judgment of the District Court of the first district of said territory.

Second—The Court erred in rendering a judgment in favor of the defendant in error against the plaintiff in error for cost, etc.

Third—The Court erred in finding that there was apparent error upon the record of the said District Court, and in finding that said District Court had no jurisdiction of the cause.

ARGUMENT.

The first question which should be determined, is whether this suit falls within that clause of section 2 of the Bankrupt Act of 1867, now section 5057 of the Revised Statutes of the United States, which provides that, no suit, at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person *claiming an adverse interest*, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

The defendant in error in this suit cannot be said to claim an adverse interest in any property or rights of property in controversy.

It is a suit to collect a debt, or to enforce the payment of money due from the defendant in error upon a contract, and the defense is simply that he does not owe any such money, that he is not indebted to the plaintiff in error; and while in one sense it is a suit touching a right of property of the bankrupt, yet the defendant in error claimed no adverse interest touching or in respect of the debt claimed in the sense of said section. If this suit is included within the provisions of said section, then clearly all choses in action of every kind existing in favor of the bankrupt's estate, whether for money due the bankrupt or otherwise, would be included. To hold otherwise would be to allow no meaning to the words "claiming an adverse interest."

Said second section of the Bankrupt Act of 1867, is a substantial re-enactment of the eighth section of the Act of 1841, and in determining what the intention of Congress was as to the class of actions which were to be commenced within two years, as provided by said section, much aid can be derived from an examination

of the juidicial construction which had been given to said provision in the said eighth section of the 1841 act.

The two sections are as follows:

Sec. 8, Act of 1841, Vol. 5, U. S. Statutes at Large, p. 446.

"*And be it further enacted*, That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; *and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any Court whatsoever unless the same shall be brought within two years* after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

Sec. 2, Act of 1867, Vol. 14, U. S. Statutes at Large, p. 518.

And, be it further enacted, That the several Circuit Courts of the United States, within and for the districts, &c. * *

Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee.

That portion of each of these sections defining the class of actions which must be commenced within two years, is printed above in italics.

Said portions are identical, and inasmuch then as Congress has literally re-enacted said portion of said 8th section of the act of 1841, it becomes of the first importance to ascertain what judicial construction had been given to the same prior to its re-enactment or incorporation into the 2nd section of the act of 1867, for it is to be presumed Congress so re-enacted it in view of such construction and in affirmation thereof.

The earliest decision giving a construction to this limitation clause of said 8th section of the Act of 1841, is by the Supreme Court of Florida, in January, 1847, in the case of *Archer, assignee*, v. *Duvals' administrator*, 1 Fla. p. 219, holding that the limitation applied to all suits.

In delivering its opionion, the Court makes use of the following language, to-wit: "It is contended by the plaintiff that this cause does not apply to or embrace the case of defendants, because there is not in question an adverse interest touching any property or right of property of the bankrupt. The Act declares that 'no suit at law by such *assignee shall in any case* be maintainable *in any court whatever*, unless brought within two years.' If this be the correct reading of the text, the Act is very explicit, and leaves no room for construction." (P. 224, 1 Fla.)

There is no room to doubt the correctness of the decision of the court in that case if its reading of the act is correct, but if that is so, a very unfortunate use of language has been made by Congress to express its meaning, for the courts of no other State have followed and adhered to that construction of this clause.

In the cases of *Comegys* v. *McCord*, 11 Ala. 932, decided in 1847, and of *Harris, assignee*, v. *Collins*, 13 Ala. 388, decided in 1848, the Florida decision was seemingly followed.

Afterwards, and in 1852, the question again came before the Supreme Court of Alabama, in the case of *Paulding* v. *Lee*, et al., 20 Ala. 753.

The court declined to follow its earlier decisions, and, although this question was directly involved and considered by the court, yet three of the five judges preferred to be considered as expressing no opinion upon the construction of said eighth section of the Bankrupt Act of 1841, but concurred with the other two judges in deciding the case upon another point involved. The two judges were in favor of adhering to their former decisions. The question was thus left, and has ever since remained an unsettled one in Alabama.

We fail to find that the court of last resort of any other State except Alabama has ever followed the decision in *Archer, assignee*, v. *Duvals' administrator, supra*. But we do find that soon after the second Alabama case was decided, the Supreme Court of Maine decided exactly the other way in the case of *Carr* v. *Lord*, 29 Maine, 51.

It is there held as appears from the head notes which we quote that:

"By the latter clause of the Eighth Section of the U. S. Bankrupt Law of 1841, declaring that certain actions should not be maintained, 'unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued,' is intended, merely, that no suit by or against the assignee, claiming an adverse interest in any property or right of property, transferable to or vested in such assignee, and no suit

by or against any other person claiming an adverse interest in the same, should be maintained, unless brought within the two years. An action upon a note, therefore, given by a person to the bankrupt, before the decree of bankruptcy, is not barred by such limitation of two years."

The next decision in point was by the Supreme Court of the State of Pensylvania, in 1849, in the case of *Union Canal Co.*, v. *Woodside*, 11 Penn. State Rep. 176. It is there held that the limitation in the Eighth Section of the Bankrupt Act of 1841: "That no suit shall in any case be maintainable by or against the assignee or by or against any person claiming an adverse interest, touching the property of the bankrupt, unless brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued, is intended to prevent the adverse claims of third persons from impeding the settlement of bankrupts' estate, and extends only to cases where there is such an adverse interest."

The next decision, giving a construction to this clause, was delivered by the late Judge Nelson in 1862, while holding the Circuit Court of the U. S. for the Southern District of New York, being at the time one of the justices of this court. The opinion being short, we give it below almost entire, viz:

"NELSON, J.—It is not important to state the facts relied on in the petition, to maintain it upon the merits, as the only question which has been adjourned to this Court by the District Court for decision is, whether or not the short bar of two years limitation to suits, prescribed in the 8th section of the Bankruptcy Act, [of 1841,] applies to the case. That section provides, that the Circuit Court shall have concurrent jurisdiction with the District Court of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt, against any person or persons claiming an ad-

verse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any Court whatever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

It is obvious, from a careful perusal of this section, that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes or claims affect the assets of the bankrupt, and an adjustment of them, either by compromise or suit, is indispensable to a settlement and distribution of the estate among the creditors. A short bar, by limitation, to suits brought either by the assignee or the adverse claimant, furnishes a fit and appropriate remedy against delay, where compromise is impracticable. The last clause of the section seems conclusive in favor of this construction. The time from which the two years' limitation begins to run, is the date of the declaration and decree of bankruptcy, or if the cause of action had not then accrued, two years after it had. The first clause of the limitation could apply only to adverse claims existing before the assignment, and the second applies to the same, but provides for the case where the right to institute the suit did not accrue till after the date of the decree." * * * * * * *

* * * * "I am of opinion that the limitation in the 8th section of the statute does not apply to the case presented, and shall direct it to be so certified to the District Court."

In re Conant, 5 Blatchford, p. 55.

Following this decision comes one by the Court of Appeals of the State of New York in the case, of *Stevens* v. *Hauser*, 39 N. Y. 302, decided in 1868. On page 309, Bacon, J., says:

"But, in my judgment, the statute in question has no application whatever to a case of this kind. In the words of Judge NELSON, in a case where he was called to interpret the eighth section: 'It is obvious that the limitation only applies to suits growing out of disputes in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes affected the assets of the bankrupt, and an adjustment of them, either by compromise or suit, was indispensable to a settlement of distribution of the assets among the creditors.' This is a very just construction of the statute, and gives effect and meaning to this provision."

The construction of this limitation clause in said eighth section of the act of 1841 came before this court, it appears, but twice before the passage of the Bankrupt Act of 1867. The first time was in 1854, in the case of *Clark* v. *Clark et al.*, 17 Howard, 315.

That suit related to a certain fund which had been paid into the United States Treasury upon an award. The Court held that the limitation act did not apply, for the reason that the suit was between the assignee and the bankrupt, and also *because the fund had never been held adversely*. (See 17 How., p. 322.)

Again, in 1862, in the case of *Banks* v. *Ogden*, 2 Wallace, 57, this court held that the act in question did not apply until two years after *adverse* possession. In that case on page 69, 2 Wall., this Court says:

"The eight section of the Bankrupt Act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such person against assignees, to two years after decree of bankruptcy or first accrual of cause of suit."

In each of these cases importance seems to have been attached to the question, as to whether or not there was

any *claiming* or *holding* the subject matter of the suit *adversely*. If there was then the limitation applied, otherwise not. While the question as to whether the limitation applied to suits by the assignee for the collection of debts, was not as directly passed upon as in the decisions of Judge Nelson, and of the State courts cited; yet there is no conflict, and the fact that there is a restriction as to the class of suits, the commencement of which is limited to two years, is very distinctly recognized in said decisions of this court.

These are believed to be all the decisions which have been reported giving a construction to this limitation provision of the bankrupt act of 1841, except *Kane* v. *Pilcher*, 7 B. Monroe, 651, and *Judson* v. *Lathrop*, 6 La. Annual Rep. 587, neither of which are of any importance. The former decides that the limitation provision does not include an application to the chancelor for a rule for the refunding of money, and the latter that it does not apply to cases where one has become the purchaser at the sale of the bankrupts effects of debts due by third persons.

The case of *Clark* v. *Hackett*, 1 Clifford C. C. Reports, simply decided that a bill filed more than two years after the cause of action accrued could not be regarded as an amendment to a former bill filed before the expiration of said two years, but dismissed by the court. The matter in controversy was the same fund which was in litigation in the case of *Clark* v. *Clark et al.*, *supra*.

From an examination of these decisions, it will be seen just what construction the courts had given to this provision of the 1841 act at the time it was re-enacted in 1867.

It will be found that from and after 1848, there had

not been the slightest conflict between the reported decision of any of our courts upon this point. That this two years limitation for commencing suits by or against an assignee did not apply to actions for the collection of debts was uniformly held during this time and therefore thoroughly settled.

These decisions have not only the weight to which they are entitled as authority, but in addition thereto is the presumption that Congress approved and sanctioned them, and it would seem that in construing the act of 1867, courts should now regard these decisions construing this re-enacted act as of the same effect as if such construction had been silently incorporated into the act of 1867. See

Rennock et al. v. *Dialogue*, 2 Peters, 1.

Independent of the fact that this 2nd section of the 1867 act had received a settled judicial construction prior to its re-enactment, it would clearly seem that the only rational construction that can be given to it is that the class of suits to which said section applies is restricted not only as to the parties suing and being sued, but also as to the subject matter in controversy. It must be "a suit between the assignee and a person *claiming an adverse interest, etc.*," and not only that, but it must also be a suit "*touching property or rights of property transferable to or vested in the assignee.*"

If words have any meaning at all, how can it be otherwise than that there are two distinct particulars in which this class of suits are limited.

Precisely the same limitation or restriction exists as to the class of suits wherein Circuit Courts are given concurrent jurisdiction with District Courts by Section 4979, Rev. Stat. U. S., which reads as follows:

"SEC. 4979. The several Circuit Courts shall have within each district concurrent jurisdiction with the District Court, whether the powers and jurisdiction of a Circuit Court have been conferred on such District Court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights [of property] of the bankrupt transferable to or vested in such assignee."

This Section 4979 is a portion or original Section 2 of the Bankrupt Act of 1867, quoted *ante* in one of the parallel columns. The words "of property," shown above in brackets, were in said Sec. 2, but have been omitted in the Revised Statutes.

Inasmuch, therefore, as said Sections 4979 and 5057 are limited in their application to the same class of actions, a judicial construction given to one may aid in construing the other.

In the case of *Morgan* v. *Thornhill*, 11 Wall. 65, it became necessary to examine and construe this second section of the act 1867, with reference to the jurisdiction of Circuit Courts. It will be seen that, after having considered the first and second provisions of said section, Mr. Justice Clifford, in delivering the opinion, says on page 75, 11 Wall.:

"Apart from those two provisions the third clause of the section provides that circuit courts *shall also have* concurrent jurisdiction with the district courts of *all suits at law or in equity* which may or shall be brought by *the assignee* in bankruptcy against any person claiming *an adverse interest*, or by *such person* against *such assignee* touching any property or rights of property of such bankrupt transferable to or vested in such assignee.

Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferable to or

vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur the party suing may, at his election, commence his suit either in the circuit or district court."

The words italicised in the above quotations are printed in like manner in the report.

And on the following page the Court says:

"Such a suit, however, by or against such assignee, or by or against any person claiming an adverse interest in any such property or rights of property, cannot be maintained in any court whatsoever unless the same shall be brought within two years from the time the cause of action, for or against such assignee, accrued."

A question involving the construction of said Section 4979 came up before this Honorable Court in the case of *Burbank et al.* v. *Bigelow*, 92 U. S. Rep. 179. With reference to the class of actions to which this section applies, Mr. Justice BRADLEY, page 182, says:

"A right of property is controverted. The complainant contends that the fruits of the judgment recovered by Bigelow, the bankrupt, against Edward W. Burbank, belong to the firm of which her husband was a partner. The bankrupt and his assignees deny this. It is a controversy, the determination of which is clearly embraced within the jurisdiction conferred upon the Circuit Court by the second clause of Section 2 of the original Bankrupt Act, now Sec. 4979 of the Revised Statutes."

It seems to have been assumed in deciding this case that there might be cases, concurrent jurisdiction of which, was not conferred by said section, otherwise why was it necessary to determine whether the controversy in that case was embraced within the jurisdiction thus conferred?

Various judges of Federal courts have decided that

this section 4979 did not confer concurrent jurisdiction upon circuit courts to entertain suits for the collection of debts. See

Goodell v. *Tuttle*, 7 B. R. 193.

Buchanan v. *Packard*, 7 B. R. 353.

Congress, by act of 22d June, 1874, amended this section by extending the jurisdiction of circuit courts to suits, by an assignee against persons "owing any debt to such bankrupt," but did not amend said section 5057 in the same particular. So that after said amendment the class of suits, of which the circuit courts had concurrent jurisdiction with district courts, was more comprehensive than the class, the commencement of which was limited to two years by section 5057.

The decisions of the various federal courts in construing this two years' limitation clause have not been uniform since the passage of the Bankrupt Act of 1867. By many courts it has been held that the limitation does not apply to suits for the collection of ordinary debts due the bankrupt prior to the adjudication. See

Smith v. *Crawford*, 7 N. B. R. 38.

Sedgwick v. *Casey*, 4 N. B. R. 496.

Woods v. *Forsyth*, 5 N. B. R. 78.

In re Krogan, 5 N. B. R. 116.

Davis v. *Anderson*, 6 N. B. R. 145–158.

Goodall v. *Tuttle*, 7 N. B. R. 193–196.

Backman v. *Packard*, 7 N. B. R. 353.

Lotting v. *Fossman, et al.*, 17 B. B. R. 183.

It has on the other hand, however, been held that this two years statute of limitations in the Bankrupt Act (sec. 5057) does apply to an action by an assignee to enforce against stockholders the payment of their unpaid shares.

Poyson, assignee, v. *Coffirn*, 5 Dillon, 473.

Fooeman, assignee, v. *Bigelow*, 18 N. B. R. 457.

Scoville v. *Shaw*, 4 Cliff. 547.

In these cases, *Bailey* v. *Glover*, 21 Wallace, 315, seems to be relied upon as an authority for holding that the limitation applies to suits of that character, but it would clearly seem that the decision in that case has been misapprehended entirely.

It was a bill in chancery filed by an assignee to set aside a conveyance of real estate made over three years before the filing of the bill on the ground of fraud, a demurrer to the bill had been sustained in the court below on the ground that the two years limitation was a bar to the suit.

On appeal this court held that there being an adverse claim the statute applied to that class of suits, yet, inasmuch as the bill alleged the existence of the fraud had been concealed from the knowledge of the assignee until within two years before the time the bill was filed, the bar of the statute did not commence to run until the fraud was discovered or become known to the party injured by it, and that the demurrer should not have been sustained.

In considering the case the Court deemed it important to determine whether any *claim had been asserted adverse* to the assignee, and found that there had been, as will be seen from the opinion delivered by Mr. Justice Miller, a portion of which is given below, italics being used only where the Court has used them, viz:

"Counsel for the appellant argues that the provision of second section of the Bankrupt Act has no application to the present case, because it is not shown that the defendants have set up or *asserted any claim* to the property now sought to be recovered *adverse* to that of the assignee. It is rather difficult to see exactly what is meant by this proposition. The suit is brought to be relieved from some supposed claim of right or interest in the property on the part of the defendants. If no such claim exists, it does not stand in the way of complainant, and he does not need the aid of a court of

equity to set it aside. If it is intended to argue that until some one asserts in words that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run, though such person is in possession of the property, acting ~~at once,~~ and admitting no other title to it. We think the construction of the proviso entirely too narrow."

"This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee." Such is almost the language in which the provision is expressed in section 5057 of the Revised Statutes.

Baily v. *Glover*, 21 Wallace, p. 346.

It is not easy to see how this decision can be considered authority for holding that the limitation applies to suits for the collection of debts.

What the Court said afterwards in its opinion relative to one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets, was general in its nature, and was not intended evidently to give any construction to this limitation clause of the statute, or at least any different construction from that it had already stated.

It is not unreasonable to conclude that Congress did not intend to limit the time for the collection of debts due to bankrupts. It provided by Sec. 5064 Rev. Stat., that the assignee might sell bad debts belonging to the bankrupt's assets, which could not be collected by him without unreasonable delay, and why should their salable value be impaired by imposing this short limitation of time within which to collect the same. It has been held,

that the limitation includes suits by the purchasers of choses in action from the assignees, if it applies at all.

Again, this statute of limitation, like any other, requires to be pleaded by the defendant, otherwise no advantage can be taken of it.

In this case it was not pleaded, nor in any manner interposed or raised in the District Court, and could not therefore be raised or considered for the first time in the Supreme Court of the Territory.

That the statute must be pleaded, even when the cause of action appears on the face of the declaration, to be out of time. See

Angell, on Limitations, Sec. 285.

Therefore, whatever may be the true construction of this statute, it is now too late for the defendant in error to receive the benefit of its provisions.

It was claimed that the District Court erred in sustaining the demurrer of plaintiff in error to the plea of set-off.

On that point this Court held, that:

A stockholder indebted to an insolvent corporation for unpaid shares, cannot set-off against this trust-fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors.

Sawyer v. *Hoag, assignee*, 17 Wall. 610.

It was also contended that said District Court erred in its rulings as to the plea that defendant was fraudulently induced to subscribe for the stock.

On this point, see

Upton v. *Tribilcock*, 91 U. S. 45.

Respectfully submitted,

HOMER COOK.

FILED
JAN 6 1882
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1881.

NO. 261

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE COMPANY, PLAINTIFF IN ERROR,

VS.

DANIEL M'LAUGHLIN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM R. STEELE, ATTORNEY FOR DEFENDANT IN ERROR.

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